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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

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IN RE GEORGE ANASTAPLO,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF ILLINOIS

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March 18, 1960

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Petitioner, George Anastaplo, respectfully prays for a Writ of Certiorari to the Supreme Court of Illinois to review the denial of his application for admission to the practice of law in the State of Illinois.

Opinions Below.

On June 12, 1957, the Committee on Character and Fitness of the First Appellate Court District of Illinois (sitting in Chicago) denied petitioner's request for rehearing of his application for admission to the Illinois bar, but not without granting him leave to file a supplementary petition for rehearing with answers to two in-

terrogatories posed by the committee. Upon receipt of petitioner's responses to these interrogatories, the committee promptly declined (on July 2, 1957) to grant petitioner a rehearing, Commissioners Rothschild and Sawyer dissenting.

Upon appeal, the Supreme Court of Illinois on September 17, 1957 ordered the committee to conduct a rehearing. The committee, almost a year after completing the rehearing ordered by its court, refused on April 9, 1959 to recommend petitioner for admission to the bar. The committee divided 11-6 and majority and minority reports were filed in the Supreme Court of Illinois.

Upon appeal again, the Supreme Court of Illinois affirmed on November 19, 1959 the decision of the committee majority, with Mr. Justice Bristow filing a dissenting opinion. On January 21, 1960, the court below denied a petition for rehearing, with two additional members (Mr. Justice Schaefer and Mr. Justice Davis) filing a dissenting opinion. (18 Ill. 2d 182, 163 N.E. 2d 429). An attempt on the part of petitioner to "settle out of court" without sacrifice of principle resulted in a fruitless exchange of letters with the committee in February, 1960.

The various opinions, orders, reports and letters that have been referred to here are set forth in the separate Appendix to this Petition (hereafter referred to as "App.").

Jurisdiction.

The judgment of the Supreme Court of Illinois was entered November 19, 1959. Timely petition for rehearing was filed December 3, 1959 and denied January 21, 1960.

A writ of certiorari is petitioned for under 28 U.S.C. § 1257, a title, right, privilege or immunity having been

especially set up or claimed under the Constitution. This Court has recently granted certiorari in bar admission cases involving facts and issues similar to those found in this case. *Schwartz v. Board of Bar Examiners*, 353 U.S. 232; *Konigsberg v. State Bar*, 353 U.S. 252 (and again on March 7, 1960). See, also, *In re Summers*, 325 U.S. 561.

Questions Presented for Review.

1. Petitioner's views as to what are relevant, necessary or permissible inquiries of applicants for admission to the bar are shared neither by the Supreme Court of Illinois nor by its Committee on Character and Fitness. Nevertheless, petitioner cannot, in good conscience and with due regard for the common good, submit to such inquiries even should the making of these inquiries into his political affiliations or associations be deemed permissible for bar admission proceedings under the Constitution. He has referred to eminent Americans of unquestioned character and good citizenship who have supported positions similar to his. His refusal is presented as a form of protest against such inquiries and proceedings and against the test-oath-like nature of the situation with which he has been confronted.

Is such a protest or refusal, especially when petitioner has otherwise sustained the burden of proof as to his character, fitness and good citizenship and when the sincerity of his position is not challenged, protected by the First and Fourteenth Amendments as an exercise of the right to freedom of speech for which no penalty, such as exclusion from the bar, may be exacted by a State?

2. Do the decisions in this case by the court below and its committee, which deny petitioner admission to the bar despite his evident qualifications to practice law, conform to the standards with respect to due process of law and

to equal protection of the laws under the Fourteenth Amendment laid down for bar admission matters by this Court in *Schware v. Board of Bar Examiners*, 353 U.S. 232, and *Konigsberg v. State Bar*, 353 U.S. 252.

3. Has petitioner been deprived of liberty and property, in violation of the freedom of speech guarantees of the First and Fourteenth Amendments, by being excluded from the bar because of the expression of legitimate opinions about the right of revolution and the Declaration of Independence?

4. Has petitioner been deprived of liberty and property, in violation of the freedom of speech and freedom of religion guarantees of the First and Fourteenth Amendments, by being excluded from the bar because of his long-standing refusal to answer questions about his political affiliations and religious beliefs?

5. Has petitioner been deprived of liberty and property, in violation of the due process and equal protection clauses of the Fourteenth Amendment by being excluded from the bar because of his refusal to answer political affiliations inquiries, the foundation of which inquiries in and the relevance of which to this proceeding have not only never been established but have even been denied by the explicit admission on the part of the Illinois authorities that they have absolutely no evidence linking petitioner with any so-called "subversive" organizations?

6. May a conscientious refusal, on plausible constitutional grounds, to answer questions about political affiliations be treated as evidence adverse to an applicant for admission to the bar without infringing upon the due process guarantee of the Fourteenth Amendment?

7. Has petitioner been deprived of liberty and property, in violation of the due process and equal protection clauses of the Fourteenth Amendment, by being excluded from the bar because of the refusal of the Illinois authorities to give proper recognition to the record as a whole, a record which is overwhelmingly favorable to petitioner, in passing upon his character and fitness for admission to the bar?

8. Has petitioner been deprived of liberty and property, in violation of the due process and equal protection clauses of the Fourteenth Amendment and of the *ex post facto* clause of the Constitution, by the attempt of the Illinois authorities to devise a "brand new exclusionary rule" whereby his refusal to answer any question put by a member of the Committee on Character and Fitness constitutes grounds for exclusion from the bar, especially when the refusal to answer these questions came early in the proceedings and did not put an end to a lengthy examination of petitioner and when only a few of the many unanswered questions are now referred to by the committee as justifying exclusion?

9. Would not petitioner's exclusion from the bar, even if he were shown to be a member of the Communist Party or of the Ku Klux Klan, be unjustified on this record in the face of the guarantees of freedom of speech in the First Amendment and of due process of law and equal protection of the laws in the Fourteenth Amendment? If so, can he be properly denied admission to the bar when all he has done is to refuse on principle to answer questions about such memberships, especially after the admission by the Illinois authorities that there is absolutely no evidence linking him with any "subversive" organization?

10. Aside from the effect of other constitutional limitations upon state action, does this Court have the power

to examine, for their wisdom as well as their reasonableness, the methods and standards employed in the state courts which supply the bar of this Court and to correct state action which excludes an applicant qualified to practice both in his state and before this Court? If such power exists, should this Court exercise it in this instance to provide for the admission of petitioner to the Illinois bar or, at least, to the federal bar and the bar of this Court?

Constitutional Provisions and Statutes Involved.

The constitutional provisions involved are Section 10, Article I and the First and Fourteenth Amendments of the Constitution of the United States. The statutory provisions involved are Chap. 110, par. 259.58, IX and Chap. 13, par. 4, Illinois Revised Statutes 1951. The pertinent text of these provisions is set forth in the separate Appendix to this Petition.

Statement.

1. 1950-1955. Petitioner began the study of law in 1948 at the University of Chicago Law School, eighteen months after completion of his war-time service as an Air Force navigator officer. His 1950 application for admission to the Illinois bar was denied by the Chicago Committee on Character and Fitness in 1951, a denial affirmed by the Illinois Supreme Court in 1954. (3 Ill. 2d 471, 121 N.E. 2d 826).

Both the court and the committee stressed as justification for their action petitioner's views on the right of revolution as well as his refusal on principle to answer questions about possible membership in any political organization. This Court, with two members dissenting, re-

fused in 1955 to review the Illinois action. (348 U.S. 946, 349 U.S. 903, 908.¹)

2. 1957-1960. A renewed application for admission to the bar was filed with the committee in 1957, after this Court's decisions in the *Schwartz* and *Konigsberg* cases. The committee refused to consider this application after inquiring of and learning from petitioner that he still held his former views with respect to the right of revolution and that he must continue to refuse to answer any questions about his political affiliations and associations.²

Petitioner appealed this 1957 decision of the committee to the Supreme Court of Illinois. That court ordered the

¹ Petitioner's 1955 Jurisdictional Statement in the Supreme Court of the United States, pp. 9-17, presents a careful summary of the initial examinations of petitioner by the Committee on Character and Fitness in 1950-1951. A substantial part of the record made at that time and on which the 1954-1955 appeal was based is reproduced in London, "Heresy and the Illinois Bar: The Application of George Anastaplo for Admission," 12 *Lawyers Guild Rev.* 163 (1952).

Law review and other comments on the 1950-1955 phase of the case are found in *The University of Chicago Maroon*, May 9, 1952; *Expose*, March-April 1953; Brown and Fassett, 20 *Univ. Chicago L. Rev.* 480, 481-2, 501, 502 (1953); Sharp, 20 *Univ. Chicago L. Rev.* 529, 541 (1953); *The Carterville (Ill.) Herald*, October 1, 1954, p. 2; *I. F. Stone's Weekly*, March 7, 1955, p. 3; Note, 1955 *Washington Univ. L. Q.* 83; Note, 2 *UCLA L. Rev.* 224 (1955); Starrs, 18 *Univ. Detroit L. J.* 195, 216 (1955); Note, 50 *Northwestern Univ. L. Rev.* 94 (1955); Sharp, 16 *Lawyers Guild Rev.* 1, 2 (1956); *The Marion (Ill.) Daily Republican-Leader*, December 26, 1956; Sharp, 47 *Lawyers Guild Rev.* 43 (1957); Cramton, 8 *Univ. Chicago Law School Record* (Special Supplement), n235 (August 1958); Brown, *Loyalty and Security*, 111-112 (1958); Pritchett, *The American Constitution*, 465-466 (1959).

Petitioner was born in St. Louis, Missouri, November 7, 1925, grew up at Carterville, Illinois, and received most of his higher education at the University of Chicago after his United States Air Force service in the Pacific, Europe, North Africa and the Middle East. He is married and the father of three children. See, for additional biographical information, Note 16, below.

² App. 1; Petitioner's Supplementary Petition for Rehearing, June 25, 1957 (this document is part of the Record.)

committee to conduct a rehearing, specifying the questions on which evidence should be taken:³

The principal question presented by the petition for rehearing concerns the significance of the applicant's views as to the overthrow of government by force in the light of *Konigsberg v. State Bar of California*, 353 U.S. 252, and *Yates v. United States*, 1 L. ed. 2d 1356, 77 S. Ct. 1064. Additional questions presented concern the applicant's activities since his original application was denied, and his present reputation.

We are of the opinion that the Committee should have allowed the petition for rehearing and heard evidence *on these matters*, and the Committee is requested to do so, and to report the evidence and its conclusions. (*Italics added.*)

In obedience to this directive, more than twenty hours of testimony were taken from petitioner by the full committee between February and May 1958 and a dozen character affidavits, references and letters were put into the record. Another year passed, however, before the committee was ready to announce its decision once again refusing to certify petitioner for admission to the bar. The committee filed with the court below at that time a report explaining its decision. Of the seventeen members of the committee, eleven signed this adverse report; six commissioners signed a minority report recommending admission. (App. 8, 28).

The court below affirmed its committee's decision on November 19, 1959 and, after a petition for rehearing, on January 21, 1960.⁴ Of the seven members of that court, four joined in the *per curiam* opinion upholding the committee majority; three justices filed two dissenting opinions recommending admission. (18 Ill. 2d 182, 163 N.E.

³ App., 7. This language seems to have been adapted from Commissioner Rothschild's 1957 dissenting opinion (App., 6) and seemed also, in this context, implicitly to rule out any further questions about petitioner's possible affiliations. See, also, 1959 Brief for the Applicant [in the Supreme Court of Illinois], 3-5.

2d 429; App., 34, 53, 78). It is of this decision and decree by the court below that review is sought.

3. What Is Wrong With George Anastaplo? As has been indicated, there are two principal grounds for dissatisfaction with the qualifications of petitioner to practice law, grounds that are emphasized in every opinion by the Illinois Supreme Court and by its committee in which his application for admission has ever been denied. First, the Illinois authorities do not approve of petitioner's views, stated on request and over his objection, on the right of revolution and the Declaration of Independence. (*E.g.*, R. 154-157, 158-169, 174-182, 237-249, 391, 397-8). Sometimes the Illinois authorities say that these opinions are not vital but that they make other aspects of the case more important; at other times they recognize what has been true throughout, that these views are crucial to their adverse reaction to petitioner's application. This is one ground for dissatisfaction with petitioner's qualifications.

Second, the Illinois authorities do not approve of petitioner's conscientious refusal to answer any inquiries into his political affiliations and associations.⁴ This has meant, in the current proceedings, that he has had to refuse inquiries about membership or possible membership in the Republican Party, the Ku Klux Klan, the Com-

⁴ Commissioners Moses and Young, who voted against petitioner's admission to the bar, are also on record as warning him that they would regard adversely his refusal to answer questions they were asking about religious beliefs. They insisted that such beliefs bore upon petitioner's ability to take in good faith the oath of office of the attorney. (*E.g.*, R. 208-210, 215-217). The committee finally ruled out such questions, but only after six weeks of sharp conflict over them and after they had had their prejudicial effect. (R. 292). Petitioner had refused, of course, to answer such inquiries, a refusal that the committee does not choose to rely upon for excluding him from the bar. In fact, this important episode and its significance are not mentioned either in the committee report or in the opinion of the court below but only in Mr. Justice Bristow's dissenting opinion. App., 58-59, 74.

munist Party, the Silver Shirts of America, and the Democratic Party.⁵ The court below and its committee have chosen in their opinions to single out as significant for passing on petitioner's character and fitness the Communist Party question among all those that petitioner has refused on principle to answer.

The connection between these two grounds for dissatisfaction should be obvious to any careful reader of the record, even though the Illinois authorities choose to ignore it: it is historically true that questions about affiliations were first asked only after and only because members of the committee did not approve of petitioner's views about the right of revolution;⁶ and it is still true that members of the committee persist in their questions about affiliations partly because they do not approve of what petitioner says about the right of revolution and the Dec-

⁵ (R. 43, 46, 144-145, 203-204). The Republican and Democratic Parties inquiries emerged as a result of the attempt by Commissioners Bane and Young to secure an answer about petitioner's political affiliations by exploiting the fact that petitioner had served on several occasions as the official election judge in his Chicago precinct. (R. 26-32, 201-205). (See, for an appraisal of this episode, App., 63).

⁶ See R. 368-380, where the proper sequence of inquiries in petitioner's first appearance before the committee in 1950 is described in considerable detail. This description was prompted, in part, by the serious distortion of that sequence in the 1954 opinion of the court below (3 Ill. 2d, at 473-474). Yet, despite petitioner's detailed analysis of the 1954 error of the court below, the distortion is preserved in the current opinion of that court. (App., 35-36). The court below stoutly refuses to face the fact that the sequence of inquiries is exactly the reverse of that described in its 1954 and 1959 opinions: questions about affiliations came only after petitioner's answers about the right of revolution and only because committee members were hostile to the legitimate opinions he had expressed on request. There can be no reasonable doubt about this. An appreciation of the proper sequence of inquiries emphasizes the infringement upon petitioner's rights under the First and Fourteenth Amendments to freedom of speech. See also petitioner's 1955 Jurisdictional Statement (in this Court), 10-15, 26-27.

laration of Independence. Thus, even the headnotes of the Illinois Reporter reflect what is all too evident in both the record and the opinion:^{6a} there is an intimate connection in the attitude and action of both the court below and its committee between petitioner's views on the right of revolution and his refusal on principle to answer questions about political affiliations.⁷

^{6a} The Illinois Reporter introduces his four-part summary of the opinion with the following captions (18 Ill. 2d 182-183):

"1. Attorneys at Law—applicant for admission to the bar must establish that he possesses the necessary qualifications."

"2. Same—when applicant's views concerning established authority and orderly governmental processes cast doubt on his ability to take oath."

"3. Same—questions concerning Communist Party membership are relevant in determining applicant's ability to take oath in good conscience."

"4. Same—when refusal to answer questions as to membership in Communist Party justifies denial of certificate of fitness."

⁷ In the current hearings, petitioner raised constitutional objections under the First and Fourteenth Amendments to questions about his views on the right of revolution, objections which were overruled by the committee. (R. 154-157). As is reported in the record, he nevertheless consented to set forth his views on this subject. Not only did he want to keep the issues as precise and limited as possible and to cooperate with the committee as fully as possible, but he recognized that his views on the right of revolution and the Declaration of Independence were already known to the committee and had been critical in the committee's 1950-1951 decision to ask and insist upon questions about his possible political affiliations (see Note 6).

Furthermore, it can be argued that there is an important practical difference between (1) discussion of the right of revolution and (2) inquiries into one's political affiliations (which petitioner has always refused to answer). The first relates to an applicant's understanding of the Constitution, to which an oath is to be taken by the attorney; the second relate to one's political views, to one's views on the best government or party under the Constitution. Our constitutional system *can* usually operate properly if the first is left open to discussion while the second set of views is left to the individual to disclose and act upon as he wishes. The second has to be protected in this manner, if only because of party spirit and of the harm that can befall the Constitution should this area not be kept beyond the inquiry (and hence control) of a particular partisan government. (This concern is reflected, for instance, in the protec-

4. What Is Right With George Anastaplo? These, then, are the two grounds for dissatisfaction with petitioner's qualifications for admission to the bar. Yet both the court below and its committee have made disclaimers that might have led one to believe that they take neither of these grounds seriously. Thus, it is conceded by the committee majority (App., 14):

that the views expressed by the applicant with respect to the right to overthrow the government by force or violence, while strongly libertarian and expressed with an intensity and fervor not necessarily shared by all good citizens, are not inconsistent with those held by many patriotic Americans both at the present time and throughout the course of this country's history and do not in themselves reveal any adherence to subversive doctrines.

An attempt is then made to bypass this concession by the effort to make something out of petitioner's suggestion that there might be circumstances in which decrees of courts should be resisted. (App., 15, 40). But the qualifications insisted upon by petitioner—for instance, that such resistance should be directed to restoration of constitutional government when the Constitution has been subverted—are ignored. (R. 174-182, 238-249; App. 55). **3**

tion given the secret ballot.)

It would be better, of course, if bar admission committees were required to steer clear altogether of discussions about the right of revolution as well: the distortion of petitioner's views on this subject, both in the committee report and in the opinion of the court below, should provide warning enough against such inquiries and discussion. But, in any event, petitioner has sought to keep the issues separate: he has spoken freely about his views on the Constitution (and, therefore, on the right of revolution); he has consistently refused to answer questions about possible membership in any number of political organizations, "subversive" or otherwise.

It is clear that petitioner would never have gotten into the "trouble" he has if he had quickly disavowed his surprisingly orthodox views on the right of revolution (R. 368-374); and it is also clear that he only made matters worse for himself by invoking what he conceived to be an historic American right, that of keeping one's political affiliations to oneself. (See Committee's Point 3, App., 17.)

The second disclaimer is seen in the concession, which petitioner could not induce the committee to make until the fifth of his six appearances before them (R. 265), that

... no one has stated [orally or in writing] to this Committee that you are or have ever been a Communist or a member of the Communist Party, or a member of the Ku Klux Klan, or a member of the organizations or any of the organizations listed as subversive by the Attorney General's list ... *

An attempt is made to minimize *this* concession by the claim that the refusal by an applicant to answer committee

* The concession made, that there is no adverse evidence with respect to petitioner's political affiliations, points up the significance of the right of revolution inquiries. It is evident that petitioner's views on revolution take on importance as the committee implicitly concedes it has no other basis for insisting on asking questions of petitioner about the Communist Party or the Ku Klux Klan. (See Note 22, as well as Committee's Point 3, App., 17 and R. 171.)

It should be emphasized that the concession of the committee—that no one had stated, orally or in writing, that petitioner had been or was a member of any organization such as the Communist Party or the Ku Klux Klan—refers to an applicant who had been before the committee on and off during a decade of excitement and suspicion. His case has been publicized throughout the State of Illinois, as well as nationally, and his name and photograph have been published throughout the State. (E.g., Chicago Daily News, September 23, 1954; Daily Southern Illinoisan, Herrin, Illinois, September 23, 1954; February 14, 1960). And yet, no one has supplied any adverse information to the committee about petitioner.

Furthermore, the committee and members thereof have made independent inquiries into these matters among prominent citizens in petitioner's home town (Carterville, Illinois); among petitioner's law school teachers and classmates; and among LaSalle Street lawyers who know petitioner well. (R. 60-61; Appendix to [Petitioner's] 1959 Brief, pp. 10-13). See, especially, petitioner's letters to the committee of April 16, 1959 and March 27, 1958, asking that the results of these inquiries be entered upon the record. The refusal of the committee to acknowledge what it considers fruitless inquiries is itself an aggravation of the due process irregularities in this case.

Thus, the concession of the committee is one that is made even more significant by the circumstances of this case and by several unsuccessful efforts of the committee to turn something up. Further inquiries could have been made with the aid of the subpoena powers the committee possesses (Rule 10)—but then, the committee knows as well as any reasonable reader of the record that the issue in this case is neither Communism nor the Ku Klux Klan. (The Rules of the Committee are set forth in the Record, in petitioner's Appendix to the 1959 Brief, 7-9.)

members' questions about these organizations constitutes obstruction of the committee's efforts to determine that applicant's character and fitness, a claim which is not supported however by reference to any rule or statute or by reference to anything in the record that has been made in this case. Even though obstruction and "recalcitrance" are suggested (App., 27, 53), it is convenient for the Illinois authorities to say nothing of the questions about religious beliefs which the recalcitrant petitioner resisted and obstructed for six weeks and which the committee ruled out of consideration only after the member pressing the questions made the tactical error of relying for support on a bizarre 1856 case that had long been overruled. (R. 144, 210, 231, 292, 270-287, 301-313).

The evidence with respect to petitioner's character and fitness is admitted by all parties to be favorable, except for the significance of his views on the right of revolution and the significance of his refusal on principle to answer questions about any political affiliations and associations. The significance of all the evidence for character and fitness purposes is presented with great care by Mr. Justice Bristow in his dissenting opinion, and is evaluated also by Justices Schaefer and Davis in their dissenting opinion as well as by the committee minority. (App., 53, 78, 28). The position of petitioner is set forth in considerable detail throughout the record and is presented by him in a comprehensive manner in his Closing Argument before the Committee on Character and Fitness. (R. 361-418).

5. How the Federal Questions Are Presented. The federal questions sought to be reviewed were raised by petitioner's pleadings, objections and briefs at each stage of the proceedings. Thus, at the outset of his Supplementary Petition for Rehearing of June 25, 1957, he says,

I should like to emphasize, lest I be thought to waive them, the claims heretofore made to rights guaranteed by the First and the Fourteenth Amendments—rights

to freedom of speech, of the press, of assembly, and to due process of law and the equal protection of the laws, all of which rights seem to me to be infringed or abridged unconstitutionally by my continued exclusion from the bar.

A detailed application of federal constitutional principles to this matter may be found in the Transcript at, among other places, R. 35, 38-39, 42, 43, 65, 92-97, 99-103, 106, 119-122, 154-157, 172-173, 185, 190, 191-201, 382-401. The briefs and petition for rehearing filed in the court below also invoke these principles. Finally, both the court below and its committee in their opinions and reports addressed themselves to and passed upon various questions raised under the Constitution of the United States. In short, there can be no doubt that federal questions were timely and properly raised so as to give this Court jurisdiction to review the judgment in this case on writ of certiorari.

Reasons for Granting the Writ.

1. It is well to emphasize at the outset that the question of membership in the Communist Party or in the Ku Klux Klan is not an issue in this case, but at most only the effect of a conscientious refusal to answer inquiries about such membership when it is conceded that there is no allegation or evidence of membership, when the inquiries occur only in the context of badgering about philosophical and political views, particularly views about the right of revolution, and when silence is couched in the form of a refusal to submit to something deemed by petitioner to be in the nature of a test oath and to be improper, ungentlemanly and unconstitutional inquiries.

Many of the considerations that prompted this Court to review the *Schwartz* and *Konigsberg* cases, within a year after declining to review the 1954 opinion of the Supreme Court of Illinois in petitioner's case,^{8a} would seem

^{8a} Review of *Konigsberg* was granted again March 7, 1960.

to call for a review of this matter now. Some of these considerations are elaborated in petitioner's Jurisdictional Statement filed with this Court in 1955, copies of which are provided.⁹

2. Still, a brief indication of some of these reasons for granting the writ, and of additional reasons which are peculiar to the present case, would seem in order. One consideration which is novel to this matter is that petitioner has been subjected to the deprivations he has suffered at the hands of the Illinois authorities partly because of the views he was required¹⁰ to express about the right of revolution. The expression of these views is at the root of his trouble, both originally and, as is evident in the transcript and the current hearings, to a remarkable extent even today. (App. 1, 14, 17, 40; R. 368-380). Thus, even the 1957 rehearing order of the court below recognized that (App., 7).

The principal question presented by the petition for rehearing concerns the significance of the applicant's views as to the overthrow of government by force in the light of [the *Konigsberg* and *Yates* cases].

To penalize petitioner for the expression of his opinions on these matters, whether these perfectly proper opinions are the primary reason or only a contributory cause of the action of the Illinois authorities, would seem to raise serious problems under the First and Fourteenth Amendments as these constitutional provisions are understood by this Court.¹¹ Furthermore, it would seem a sufficient

⁹ This Jurisdictional Statement is incorporated in the record of the current proceedings. (R. 384). The 1950-1955 phase of this controversy is recorded at 3 Ill. 2d 471, 121 N.E. 2d 826; 348 U.S. 946, 349 U.S. 908.

¹⁰ (R. 154-157; See Note 7).

¹¹ *Gitlow v. New York*, 268 U.S. 652; *Cantwell v. Connecticut*, 310 U.S. 296, 303; *West Virginia Board of Education v. Barnette*, 319 U.S. 624. (See Notes 16 and 24).

reason for review by an American Supreme Court that there is here a case in which a decade-long exclusion from the bar has resulted from an applicant's stubborn defense of the principles of the Declaration of Independence.

3. Related to this reason for review is the fact that the Illinois authorities have permitted themselves to be diverted from the duty prescribed by law, the duty of passing upon the character and fitness of applicants for admission to the bar.¹²

This is a long record, perhaps the longest ever made in an Illinois bar admission proceeding.¹³ It is appropriate that one of the dissenting opinions opens with the report (App., 78).

As a result of the exhaustive hearings before the Committee, we now have far more information as to the moral quality, the legal capacity and the political views of this applicant than is ordinarily the case.

Thus, this is not simply a case of a refusal, amounting to obstruction of the judicial process, to comply with the known, necessary or accepted requirements of bar admission proceedings. In fact, many requirements and inquiries have been newly-devised for this applicant. Furthermore, the alleged obstruction—the refusal on principle to answer questions about political affiliations—came very early in the current proceeding. Indeed, the committee and the court below knew even before the rehearing

¹² Six members of the committee conclude their minority report, "We now know the applicant is fit and of good character. On this record, it is pure sophistry to hold that his refusals to answer have prevented our determining his character and fitness. To deny admission under these circumstances would be a disservice to the Bar and a violation of the traditional concepts of fairness and due process. To do so under the shelter of burden of proof is a retreat to formalism we are unable to join." (App., 33).

¹³ Some applicants are deemed by the committee to have been sufficiently "tested" for their character and fitness for bar admission purposes in appearances that last only five minutes before a subcommittee of two members. (R. 257).

was ordered that petitioner would maintain his former position and refuse to answer questions of a certain kind.¹⁴ Moreover, the 1957 rehearing order issued by the court below implicitly excludes questions about political affiliations.¹⁵

Almost two dozen hours were spent by petitioner in his six appearances before the full committee. This fact alone suggests that the committee was interested in more than petitioner's refusal to answer political questions. It is hardly fair then for the committee to claim now that the refusal to answer certain questions about political affiliations should be sufficient to disqualify an applicant. One must wonder what the purpose of the four months of hearings was and why it took a year, after the close of the hearings, before the committee could decide that nothing mattered after page 34 of the 400-page transcript. (See

¹⁴ Petitioner's Supplementary Petition for Rehearing, June 25, 1957; App., 1, 5.

¹⁵ The committee recognized that this order (App., 7) was controlling and therefore tried to fit its affiliations inquiries into one or another of the three categories permitted and ordered by the court. (1959 Brief for the Applicant, 3-5; *e.g.*, R. 32, 76-77, 100, 173, 219; App., 17-18; Note 3, above. See, also, Kalven-Steffen *amici* brief, 3-7).

This order of the court is the nearest petitioner has come to securing anything like a pleading, showing him what the case is about and what to expect. (Petitioner made several requests for advance notice of what would be inquired into during his four months of appearances before the full committee, especially after it became evident that the limits set by the court below were not to be respected by the committee. The committee repeatedly refused to give such notice. See, *e.g.*, petitioner's letters of March 3, 1958, March 27, 1958, and April 15, 1958 (and the committee response of April 16, 1958), all of which are in the Record.)

Neither the committee report nor the opinion of the court below addresses itself to the complaint of petitioner that the affiliations inquiries were outside the scope of inquiry laid down by the 1957 order of the court below. This refusal to abide by carefully designated limits—by “the law of the case”—reinforces the due process arguments made by petitioner. In addition, no serious attempt is made to apply such standards as “character and fitness” in their normal and traditional sense.

Note 18, below.) It would seem to be in the interest of this Court to review such disregard of ordinary judicial practice, especially since the state courts control the entrance into the bar of this Court.¹⁶

4. The force of these considerations is augmented when one assesses the character and fitness evidence in this record. There are the very favorable character references and affidavits collected pursuant to committee rules and on committee forms. No further comment on these appraisals of petitioner is necessary except for the suggestion that they be studied. Nor is there in the record anything adverse to petitioner's "character and fitness", aside from the possible significance of his long-standing refusal to answer certain questions.¹⁷

¹⁶ Petitioner made an unsuccessful attempt to secure admission directly to the bar of this Court after he failed to secure review of his case in 1955. 349 U.S. 903. (See, also, Note 24.) Petitioner respectfully suggests that this Court reconsider in the light of subsequent developments in his case its 1955 decision denying his Motion for Leave to File an Application for Admission to the Bar of the Supreme Court of the United States. It should be noted, in this connection, that petitioner, before pressing for appellate review on this occasion, unsuccessfully explored possibilities for an honorable settlement of this controversy "out of court." (App., 81-82).

The outcome of this litigation bears not only upon petitioner's right to practice the profession for which he has been trained but also, as a practical matter, upon his prospects as a university and law school teacher. (R. 249-253). Petitioner, who is writing a PhD dissertation (tentatively entitled, *Notes on the First Amendment*), is presently serving as Lecturer in the Liberal Arts and Research Associate in University College, The University of Chicago.

¹⁷ Even if it should now be shown that petitioner is a member of either the Communist Party or the Ku Klux Klan, such membership should not on this record and in the light of all the other evidence be enough to counter the overwhelming effect of the record in petitioner's favor (assuming, for this purpose, even the committee's severe opinion about the Communist Party and about the Ku Klux Klan).

The question still remains, that is, whether a known member of either the Communist Party or the Ku Klux Klan can and should be excluded on that ground alone. Certainly, the Attorney General's "list" often relied on in these proceedings has not been either designed or tested for bar admission purposes.

What about the unanswered questions? The committee was driven to admit it had no evidence linking petitioner with any of the organizations about which he has refused to speak. (Transcript, 265). No one has explained why any of the unanswered questions make any difference in petitioner's case, even though these are questions of the kind that should require even more rigorous justification than would the questions that the committee might ordinarily ask.¹⁸ The concession of the committee that it has no adverse evidence points up the element of protest in petitioner's refusal and hence the problem of freedom of speech raised by his exclusion from the bar.¹⁹

¹⁸ The one "subversive" political organization question for which an attempt to lay a foundation was made came from Commissioner Bane in an incident which is described by Mr. Justice Bristow as follows: "At the very first session, applicant was asked whether he was a member of any nationality organization. After he replied that he was not, he was asked whether he was a member of a [Greek] nationality organization that had been designated by the Attorney General as subversive. Applicant refused to answer, explaining that when the question designated the organization as subversive, its intent was to elicit information about political affiliations. To such inquiry he must object on the ground that it infringed his rights under the first and fourteenth amendments, was beyond the province of a Character and Fitness Committee, and, more particularly, was outside the terms of the Supreme Court [of Illinois] rehearing order of 1957. He pointed out that if the committee was interested in eliciting information, it already had the answer to the question, since he had just stated that he was not a member of any nationality organization." (App., 56).

A "foundation" had been laid for this inquiry by establishing first that petitioner was of Greek descent! (R. 33). The question whether he was a member of this organization was the first political question petitioner refused to answer during the current proceedings. (R. 34-41). Presumably, the committee's investigation was irretrievably "obstructed" from then on through page 420. It is submitted that this episode, which reflects anything but fair play, is really symbolic of all the affiliations inquiries in this case. And yet the committee can suggest that petitioner's principled refusals to answer such questions interfere with a proper determination of his character and fitness. Everyday notions of due process, of how judicial bodies should regulate themselves, are sufficient to condemn behavior of this kind. See petitioner's 1959 Brief in the Supreme Court of Illinois, 8-12.

¹⁹ See petitioner's 1955 Jurisdictional Statement, Supreme Court of the United States, 28-33.

5. There never has been a rule or statute in Illinois providing that an applicant must answer all questions put to him by character committee members. Neither the committee nor the court claims otherwise.²⁰ A study of the record indicates why Illinois dares not establish such a rule; there are too many impulsive members on every character committee, with the result that there are several questions petitioner refused to answer which the court below and its committee would prefer to ignore (such as the

²⁰ During the course of petitioner's examination by the committee, the chairman of the committee, at every point where the significance of a refusal to answer questions was discussed, conceded implicitly or explicitly that such a refusal was but one piece of evidence to be evaluated as part of the record. (R. 37, 116-117, 142, 269-270, 337-338). A careful examination discloses that there is not in the record any warning that a refusal to answer a particular question would be sufficient grounds for exclusion. Such a warning (based on a rule or statute) would have to be given in order to avoid the holding of the *Konigsberg* case, 353 U.S. 253, at 261. If, however, the warning referred to in the *Konigsberg* opinion is considered to have been given petitioner, then this Court is faced with the problems that were set aside as unnecessary to reach in the *Konigsberg* case, the "far reaching and complex questions relating to freedom of speech, press and assembly." (One of the most puzzling aspects of this case is seen in the committee argument that an exchange of letters between committee and petitioner in September 1958 deprives petitioner "of any benefit from the decision in the *Konigsberg* case." (App., 20). These letters are set forth in the Appendix to the 1959 Brief for the Applicant, 14-19. The authors of this passage in the committee report must have relied on a mistaken recollection of what these two letters contain. Not the least curious aspect of the committee majority report is the remarkable suggestion that an applicant who disagrees with the committee majority in interpreting or applying the opinions of this Court is thereby to be considered of dubious character. App., 27. See Note 23.) (See, also, on "warning," R. 3, 5-6, 42, 212.)

The references to the *Konigsberg* case should not conceal the fact that in certain essential respects petitioner's case is more like the *Schwartz* case: the role of the unanswered questions is minimized if not virtually ruled out by the admissions made by the committee and the striking impression that remains is the refusal of the committee to give due weight to the "dictates of reason" and to the overwhelming character of the evidence in the light of the "character and fitness" purpose of the committee. (353 U.S. 232, at 249).

questions about membership in the Republican and Democratic Parties, about petitioner's religious beliefs, and even about membership in the Ku Klux Klan and the Silver Shirts of America.²¹

These unanswered questions are passed over without mention in reports and opinions, while those about the Communist Party are emphasized.²² In fact, it was left

²¹ It should be noted that every commissioner who insisted in the course of the proceedings upon any question on whatever subject—upon any question which petitioner refused to answer—voted against petitioner at the end of the proceedings (even after the committee chose either not to mention his particular question in its report or to rule it out of its consideration). An applicant can say "No", and perhaps the committee may agree that he did so properly; but the thwarted commissioner can also say "No" when the votes are cast—and only this Court is left to say whether he may properly do so in the face of a record which is overwhelmingly favorable to an applicant.

²² But, it might now be argued, the Illinois authorities do not insist that an applicant must answer every question asked him; rather, they insist only upon those questions which, after extended reflection and long deliberation, the character committee decides the applicant should have answered. Even if one overlooks the difficulty faced by an applicant who must predict which questions the committee might later vote to take seriously, the problem remains, Why should these specially designated questions be singled out, as distinguished from the others? Is it because of the evidence the committee has, or because of petitioner's views on the right of revolution?

With respect to the first of these two possible explanations, it should be pointed out that there is no less evidence in the record of membership in the Ku Klux Klan, for example, than there is of membership in the Communist Party. And yet the unanswered question about the Communist Party, not that about the Ku Klux Klan, is emphasized. That leaves, as a possible explanation for this distinction among questions and as a justification for the insistence upon the Communist Party question, only petitioner's views on the right of revolution (and the Declaration of Independence). But here the Illinois authorities draw back and in effect say, We need give no reasons why we insist upon certain unanswered questions and ignore other unanswered questions, or why we insist upon them of this applicant and only of this applicant; after all, we are responsible for the quality of the Illinois bar while the Constitution can look out for itself; besides, the Russian Communists are terrible people.

to Mr. Justice Bristow in his dissenting opinion to notice all the unanswered questions and to point out that, very far from adverse evidence, petitioner's refusal to answer improper questions may be quite favorable evidence indeed for character and fitness purposes. (App., 58, 74, 77-78).

6. The cardinal judicial sin committed both by the court below and its committee is the refusal to approach and evaluate the record as a court should and would do in the usual case. This refusal to take due account of an exhaustive examination conducted under the direction of the court below, as well as the refusal to insist upon a proper foundation for political questions and upon a showing of relevance and pertinence for political inquiries—all these departures from sound judicial practice raise serious questions under the due process and equal protection clauses of the Fourteenth Amendment. On the other hand, the insistence upon the political inquiries found in this case, and the continued exclusion of petitioner for a refusal to answer such inquiries in this context, raise serious freedom of speech questions under the First and Fourteenth Amendments.

These are questions that should bear upon the decision whether a review of the case is appropriate. Reinforcing these considerations is the likelihood of a marked injustice in this matter, one that cannot but continue to have serious consequences for the independence and integrity of the bar.

7. Perhaps it is unfashionable these days to urge as still another reason for granting review the suggestion that the Illinois authorities have cavalierly refused to apply the most relevant law of the law—the rulings of

this Court in the *Schware* and *Königsberg* cases.²³ It is appropriate that petitioner, who has been unjustly attacked as a threat to constitutional government because of his carefully qualified views on the right of revolution and the Declaration of Independence, should be subjected to judicial action that amounts to a deliberate refusal by Illinois to abide by the rule of law: petitioner can claim what the Illinois bar authorities cannot, that he has always obeyed the law of the land and the decrees of judicial tribunals.

²³ (353 U.S. 232, 252). Attempts have been made to avoid the ruling in these cases by reliance upon the *Beilan* and *Lerner* cases, 357 U.S. 399, 468. But the *Beilan* and *Lerner* situations seem clearly distinguishable from bar admission matters. For *Beilan* and *Lerner* do no more than apply a public employees doctrine that had been long established by cases such as *Adler v. Board of Education*, 342 U.S. 485, and *Garner v. Los Angeles Board*, 341 U.S. 716, when the bar admission cases of *Schware* and *Königsberg* were decided. *Beilan* and *Lerner* deal with situations where, partly because of the statutes involved, a refusal to answer questions was regarded as *ipso facto* disqualifying for public employment. A refusal to answer constituted incompetency, and even substantial obstruction; a warning to this effect was clearly given by the state authorities; and the record is primarily devoted to this warning. In addition, these two cases deal with situations in which evidence of the proscribed affiliations was in the record.

These distinctions are pointed out in petitioner's letter to the committee, September 23, 1958, which is found in the Appendix to the 1959 Brief of the Applicant, 15-19, as well as in the 1959 Brief of the Applicant, 14-15. (See Note 20, above.) See, also, Kalven-Steffen *amici* brief, 8-13, which includes the observation, "In view of the Committee's own handling of the *Beilan* and *Lerner* precedents, it adds a note of irony to the record that the majority made so much of Anastaplo's intransigence in failing to capitulate to their reading of the two cases."

Similar distinctions apply to the use of the *Barenblatt* case by the court below. See, e.g., Mr. Justice Bristow's dissenting opinion (App., 66-68, 74).

8. These would seem to be reasons enough for reviewing this case.²⁴ Petitioner has developed his constitutional arguments at considerable length and with great care in the hearings before the committee and in the various briefs he has filed which are part of the record. Analyses of the evidence and additional arguments are found in the dissenting opinions of members of both the court below and its committee and in the *amici* brief of Professors Kalven and Steffen.

Indeed, it would seem that there are enough reasons not only for granting the writ of certiorari but even for a summary judgment, on the basis of the preliminary papers and the record, reversing the judgment below and ordering the Illinois authorities to provide for petitioner's admission to the bar, thereby sparing him the expense and

²⁴ In addition to the application of other constitutional limitations upon state action, does not this Court have the power and obligation to examine the methods employed in the state courts which supply the bar of this Court and to correct state action which excludes an applicant who is qualified to practice both in his state and before this Court? Such a power would seem to rest in the paramount judicial body in the United States and would be comparable to Congressional power to evaluate and correct State electoral requirements. Although the Congressional power is derived from an explicit constitutional provision, it provides a model for a Court that has never hesitated to enforce implied prohibitions against the burdening by states of federal instrumentalities. *McCullough v. Maryland*, 4 Wheat. 316 (1819). Of course, the power of states to admit is not, "while this Court sits," the power to deprive this Court of counsel. But this state power, if not examined scrupulously both for un wisdom as well as unreasonableness by this Court in situations where departures from usual and accepted practices are evident, is the power to affect adversely the quality of the bar of the Supreme Court of the United States as well as of the subordinate federal courts which are more limited in self-protection. The assertion of any latent power to examine state bar admission policies and practices would be particularly appropriate in an era when scholarly research and judicial action seem to be limiting the scope of previously accepted constitutional limitations upon governmental action.

effort of further litigation.²⁵ Such decisive action would help to correct the abuses that have developed the past decade in bar admission practices throughout the nation.

It is fitting to close with an emphasis upon the record made in this case, especially since that record has been neglected thus far by the court below and its committee. The best substitute for the record is Mr. Justice Bristow's dissenting opinion. In addition, the Closing Argument by George Anastaplo before the Committee on Character and Fitness provides for the curious an account of what petitioner has been doing and why.²⁶

Conclusion.

For the foregoing reasons, relating to both the common good and individual rights, it is requested that the Court grant this petition for a writ of certiorari and otherwise provide that justice finally be done in this matter.

Respectfully submitted,

GEORGE ANASTAPLO, *Petitioner,*
Counsel pro se.

Chicago, Illinois
March 18, 1960

²⁵ All expenses connected with this controversy have been borne throughout by petitioner.

Copies of the documents referred to here—including the briefs below, the opinions of the court below and of its committee, and the *amici* brief—are provided in sufficient quantity for this Court. In addition, nine sets of the most critical part of the record (that is, the entire transcript of petitioner's six appearances before the committee in 1958) are provided in the form prepared for the use of the court below, a form which may be even easier to read than a printed version would be. (The Secretary of the Committee on Character and Fitness has kindly provided petitioner these sets.)

²⁶ (R. 361-418). This Closing Argument of May 26, 1958 has been reprinted in its entirety in Volume 19, Number 4, of *The Lawyers Guild Review*, copies of which are provided for the convenience of the Court.

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I.

**ORDERS OF THE COMMITTEE ON CHARACTER
AND FITNESS IN 1957.**

June 12, 1957

It is ordered that the petition for rehearing of George Anastaplo, applicant, be and the same is hereby denied, without prejudice, however, to applicant to file an amended or supplemental petition for rehearing with the committee within 15 days from the day hereof, such amended or supplemental petition to include, among other things, additional information for the committee in the following areas:—

- (a) Applicant's willingness to answer questions heretofore asked (but not answered) in the prior proceedings, which questions were deemed pertinent and proper by the Illinois Supreme Court (*In re Anastaplo*, 3 Ill. 2d 471);
 - (b) Applicant's views with respect to the overthrow of government by force.
-

July 2, 1957

This cause coming on to be heard on the sworn supplementary petition for rehearing and discussion having taken place by the Commissioners and

The commissioners having before them the original record, the original petition for rehearing and supplementary petition of applicant, and it appearing to the Commissioners that except as supplemented to date by insignificant

facts pertaining to applicant's life, the matter is virtually in the same posture as it appeared before the Illinois Supreme Court, and the Committee is of the opinion it has no alternative but to deny the said petition.

Now therefore, it ordered that the same supplementary petition of applicant be and the same is hereby denied on the authority of *In Re Anastaplo*, 3 Ill. 2d 471.

Dissent of Edward I. Rothschild, a Member of the Committee, to the Action of the Committee Denying Applicant's Petition for Rehearing.

On July 2, 1957, the Committee on Character and Fitness for the First Appellate Court District denied the petition of George Anastaplo for rehearing on his application for certification for a license to practice law in Illinois. In refusing to consider the matters raised by the petition, the Committee, in my opinion, failed to discharge its proper function and its duty to the Supreme Court of Illinois. Because of the public nature of the matter, I note my disagreement with this action and my reasons therefor.

George Anastaplo graduated from the University of Chicago Law School, passed the Bar Examination, and first applied to this Committee in October of 1950. His record appeared to be satisfactory and he submitted the usual affirmative evidence of good character and moral fitness.

In the course of several hearings before this Committee in 1950 and 1951, two serious problems appeared to the Committee. First, the applicant refused to answer questions as to whether or not he was a member of the Communist Party. And, second, he expressed certain beliefs in the right of revolution.

With respect to the first problem, that of refusing to answer questions, the applicant explained on several occasions that he did not think they were proper questions for this Committee. A unanimous Committee, and subsequently the Supreme Court of Illinois, disagreed with this view, though neither expressed any doubt of the applicant's sincerity in his position. In this connection, it should be noted that neither at the time of its original action in 1951, nor at this time, does the Committee have any substantial evidence or suggestion of evidence that the applicant is or ever was a Communist.

With respect to applicant's views as to the right of revolution, it seems to me, as it did at the time of our original action, that the record in this case, fairly read, indicates that applicant's beliefs are philosophical and abstract and deal solely with political theory and not with any movement or thought toward the violent overthrow of the government by force. If this is so, these beliefs do not constitute grounds for denying applicant a certificate and cast no doubt in my mind as to applicant's good faith in his oath to uphold the State and Federal Constitutions.

(This Committee in its report of its original action in 1951, based its denial of a certificate solely on applicant's refusal to answer questions which the Committee considered relevant to its inquiry. The Committee reached no conclusion with respect to applicant's views on violent overthrow and stated that these views were not the basis of its action:

"The Committee reached no conclusion as to whether the applicant's views were purely philosophical and academic or whether they were also a basis for conduct or action, however deferred." Report of the Committee (on original application), p. 15.

The Supreme Court of Illinois held that the Communist questions should have been answered and denied applicant's application for a license, *In re Anastaplo*, 3 Ill. 2d 471, 121 N.E. 2d 826 (1954), noting that the Committee had not reached a conclusion as to applicant's views on revolution. Certiorari was denied, 348 U.S. 946.

On May 6, 1957, the Supreme Court of the United States decided *Konigsberg v. The State Bar of California and the Committee of Bar Examiners*, U.S., 25 U. S. Law Week 4281. There, an applicant for admission to practice law in California refused to answer the same kind of questions about Communism and for the same kind of reasons. The Supreme Court of the United States held that on the record in that case California could not constitutionally deny him a license to practice law.

Konigsberg differs from the *Anastaplo* situation in two respects. First, there was substantial independent evidence of Communist Party membership by *Konigsberg*, whereas there is none as to *Anastaplo*. If California could not question *Konigsberg* about Communist Party membership, despite such independent evidence, I do not see how we can in the absence of any such evidence, unless *Anastaplo's* thoughts on revolution permit us to do so.

The second distinction between the *Konigsberg* case and *Anastaplo* presents a more difficult problem and one which this Committee, in my opinion, has a duty to consider. That is the problem of *Anastaplo's* belief in the right of revolution. In *Konigsberg*, the applicant stated categorically that he did not believe in the overthrow of the government by force and apparently this satisfied the Supreme Court of the United States. *Anastaplo*, on the other hand, states that he does believe in the right of revolution and the use of force.

The question—and in my opinion the sole question—which must be determined, is whether Anastaplo's beliefs keep him outside the shelter of *Konigsberg*. This question is a question of fact upon which this Committee should either reach a conclusion on the old record and the current petition for rehearing, or, if it is unable to do so, it should hear further from the applicant on this one issue which was expressly reserved in the prior consideration of this applicant.

The issue is brought clearly into focus by the decision of the Supreme Court of the United States in *Yates, et al. v. United States*, U.S., 24 U.S. Law Week 4475, decided on June 17, 1957. In *Yates*, the Court distinguished between advocating and teaching forcible overthrow of government as an abstract principle, and efforts to instigate action to that end. *Yates*, of course, deals with the Smith Act and the distinctions there made in the narrow interpretation of a criminal statute are not necessarily controlling here. But to the extent in point, *Yates* is authority for Anastaplo's espousal of abstract doctrine, if in fact that is all there is to his views.

As I read the petition for rehearing, Anastaplo is saying, in effect, "I have done nothing more than *Konigsberg* did in refusing to answer questions, and my political philosophy is no different than *Yates*!"¹ If in fact his views are no different than *Yates*,² I see no basis either for requiring answers to the Communist questions or for denying

¹ Nor have Anastaplo's views been tailored to meet *Konigsberg* and *Yates*. The petition for rehearing contains nothing substantial that was not expressed in the original hearings, 6 or 7 years prior to *Konigsberg* and *Yates*.

² In my opinion they are less "revolutionary" than *Yates* as *Yates* are described by the Supreme Court of the United States.

Anastaplo a license. But we cannot determine this by denying the petition for rehearing and not even considering the question.

I realize that ours is a limited function and that the ultimate accommodation of the opinions of the Supreme Court of the United States in *Konigsberg* and *Yates* and the action of the Illinois Supreme Court in *Anastaplo* is for those courts and not for us. But I see no reason to refuse to perform our limited function.

I would grant the petition for rehearing, take evidence on (1) applicant's activities during the period since the denial of his original application, (2) his present reputation, and (3) his views on overthrow of the government by force. It may be that whatever conclusions we might reach on these three subjects, we would be bound to deny a certificate on the basis of *In re Anastaplo*. But at least we would have made the factual inquiry and given the Supreme Court of Illinois the benefit of our consideration of these matters, so that it would be in a position to dispose of the questions raised by this application. We would do no less in the case of any other applicant.

Commissioner Sawyer also dissents from the action of the Committee in denying Applicant's petition for rehearing, on the ground that the applicant should be permitted the opportunity, if he so desires, to make a record specifically in the light of such new considerations as he may deem have come into play by reason of decisions of the United States Supreme Court rendered since applicant was last examined.

II.

**ORDER OF THE SUPREME COURT OF ILLINOIS,
SEPTEMBER 17, 1957.**

The Court entered the following order:

N.R. 780 *In re George Anastaplo*

In 1951 the Committee on Character and Fitness for the First Appellate Court District denied the application of George Anastaplo for admission to the bar of Illinois. This Court affirmed the action of the Committee, (*In re Anastaplo*, 3 Ill. 2d 471) and the Supreme Court of the United States denied certiorari. (348 U.S. 946)

Subsequently the applicant filed with the Committee a petition for rehearing on the basis of certain decisions of the Supreme Court of the United States. The Committee denied this petition.

The principal question presented by the petition for rehearing concerns the significance of the applicant's views as to the overthrow of government by force in the light of *Konigsberg v. State Bar of California*, 353 U.S. 252 and *Yates v. U. S.*, 1 L. ed. 1356, 77 S. Ct. 1064. Additional questions presented concern the applicant's activities since his original application was denied, and his present reputation.

We are of the opinion that the Committee should have allowed the petition for rehearing and heard evidence on these matters, and the Committee is requested to do so, and to report the evidence and its conclusions.

III.

REPORTS OF THE COMMITTEE ON CHARACTER AND FITNESS, APRIL 19, 1959.

[MAJORITY REPORT].

On June 5, 1951, the applicant, GEORGE ANASTAPLO, was notified by this Committee that on the basis of hearings conducted prior to that date he had failed to prove such qualifications as to character and general fitness as in the opinion of the Committee would justify his admission to the bar of Illinois.

The applicant appealed from this ruling to the Supreme Court of Illinois, seeking a reversal of this Committee's action. In proceedings entitled "*In re Anastaplo*," 3 Ill. 2d 471 (1954), the Supreme Court of this State denied applicant's petition. The applicant then appealed to the Supreme Court of the United States, which court, treating the appeal as a petition for writ of *certiorari*, denied *certiorari*, 348 U.S. 946.

In its opinion the Supreme Court of Illinois held, based upon *American Communications Association v. Douds*, 339 U.S. 382, 94 L. ed. 925, 70 S. Ct. 674, *Dennis v. U. S.*, 341 U.S. 494, 95 L. ed. 1137, 71 S. Ct. 857, and *Re Summers*, 325 U.S. 561, 89 L. ed. 1795, 65 S. Ct. 1307, that certain inquiries directed to applicant by this Committee concerning applicant's political affiliations and organizational memberships did not violate either the First or Fourteenth Amendment to the Constitution of the United States. (3 Ill. 2d at pp. 480-481.) In reaching this conclusion, our Supreme Court set forth the "established conspiratorial nature" of the Communist Party on the one hand and the position of great influence of attorneys in the community on the other, and its genuine doubt whether a Communist

Party member could in good conscience take the oath required as a condition of admission to practice. (3 Ill. 2d at p. 480.) From these premises it concluded:

"Under any hypothesis, therefore, questions as to membership in the Communist Party or known subversive 'front' organizations were relevant to the inquiry into petitioner's fitness for admission to the bar. His refusal to answer has prevented the committee from inquiring fully into his general fitness and good citizenship and justifies their refusal to issue a certificate." (3 Ill. 2d at p. 480.)

Finally, our Supreme Court held that an applicant—knowing that the right to practice law is conditioned upon proof of his good moral character, of his general fitness to practice law and of his good citizenship, and upon the taking of an oath to support the Illinois and Federal Constitutions—may not defeat "pertinent inquiry into his ability to fulfill such conditions by any claim of the right of free speech." (3 Ill. 2d at p. 482.) In this connection it analogized the principles applied in the field of public employment and held that the application for admission to the Bar constituted an agreement "to waive his constitutional right of free speech against relevant inquiry." (3 Ill. 2d at pp. 482-483.) The opinion concluded:

"We conclude that the committee's inquiry into petitioner's membership in the Communist Party was relevant to a determination of his good citizenship and his ability to take the oath of lawyer in good conscience, and that petitioner's constitutional rights were not infringed upon by such action. On the present record the petition must be denied." (3 Ill. 2d at 483.)

On June 25, 1957, following the decisions of the Supreme Court of the United States in *Konigsberg v. State Bar of California*; 353 U.S. 252; 1 L. ed. 2d 810, 77 S. Ct. 722, *Schwartz v. Board of Bar Examiners of State of New*

Mexico, 353 U.S. 232, 1 L. ed. 2d 796, 77 S. Ct. 752, and *Yates v. United States*, 354 U.S. 298, 1 L. ed. 2d 1356, 77 S. Ct. 1064, Anastaplo applied to this Committee by supplementary petition for rehearing of his application for admission to the Bar. On July 2, 1957, the Committee denied the application.

On September 17, 1957, the Supreme Court of Illinois entered the following order:

"In 1951 the Committee on Character and Fitness for the First Appellate Court District denied the application of George Anastaplo for admission to the bar of Illinois. This Court affirmed the action of the Committee (*In re Anastaplo*, 3 Ill. 2d 471.) and the Supreme Court of the United States denied certiorari. (348 U.S. 946.)

"Subsequently the applicant filed with the Committee a petition for rehearing on the basis of certain decisions of the Supreme Court of the United States. The Committee denied this petition.

"The principal question presented by the petition for rehearing concerns the significance of the applicant's views as to the overthrow of government by force in the light of *Konigsberg v. State Bar of California*. 353 U.S. 252 and *Yates v. U. S.*, 1 L. ed. 1356, 77 S. Ct. 1064. Additional questions presented concern the applicant's activities since his original application was denied, and his present reputation.

"We are of the opinion that the Committee should have allowed the petition for rehearing and heard evidence on these matters, and the Committee is requested to do so, and to report the evidence and its conclusions."

On October 17, 1957, at the request of the Committee, acting pursuant to the Court's direction that he be granted a rehearing, applicant filed his responses to the customary questionnaire which the Committee requires be answered by all candidates for the Bar. In responding to the ques-

tionnaire, applicant, for the most part, supplied information to the Committee which supplemented the answers which were given to a previous questionnaire filed with the Committee on October 26, 1950. The Committee has also received the usual attorneys' affidavits and character affidavits from persons familiar with the applicant and has had communications from various individuals whose names were given as references by the applicant and who supplied information concerning Anastaplo's moral character and general fitness to practice as an attorney.

Thereafter, this Committee conducted hearings on February 28, 1953, March 21, 1958, April 7, 1958, April 23, 1958 and May 19, 1958. Applicant appeared personally and gave oral testimony which, including argument, aggregates 420 pages in the record. In addition, the applicant has submitted to the Committee various law review articles, newspaper reprints and other exhibits and has addressed several letter communications to the Committee which appear in the record. During the hearings the Committee repeatedly reminded applicant that he had the right to be represented by counsel and to call witnesses, but he has preferred to rest his case on his own testimony and advocacy. (R. 3, 55.)

Since applicant's original application was denied, he has been engaged principally in the academic life as an instructor and research assistant at the University of Chicago. From the character affidavits and reference letters which have been submitted to us, it would appear that the applicant is well regarded by his academic associates, by professors who had taught him in school and by members of the Bar who know him personally. We have not been supplied with any information by any third party which is derogatory to Anastaplo's character or general reputation. We have received no information from any outside

source which would cast any doubt on applicant's loyalty or which would tend to connect him in any manner with any subversive group.

We have interrogated applicant at considerable length concerning his belief in the right to overthrow the government by force and violence. The applicant's views are perhaps best summed up in his own words which appear at p. 391 of the Record:

"Almost everyone would agree there are times when a government should be overthrown by force. Ultimately, a citizen has to decide for himself when such a time comes—when the principles of the Declaration of Independence apply. The conscientious citizen reserves the right and duty to judge his government even as he takes the oath to support not that government but the Constitution. In fact, our Constitution can be said to have this right implicit in it, a right that protects the Constitution itself from subversion by a government that may be constitutional only in appearance. But, as I said when I first appeared before the full Committee on January 5, 1951, I do not think anyone would be justified at a time such as this, when the normal processes of government permit reasonable and peaceful change, to participate in action leading to the overthrow of government.

"The right of revolution, as I understand it, is something that probably all the members of the Committee on Character and Fitness and of the Supreme Court of Illinois believe in. The Committee must realize that I would be no less reluctant than they to see this right of revolution exercised except in the most extreme circumstances. I trust that my position, and what I have contributed to its defence, indicate an abiding commitment to constitutional government."

In explaining his view the applicant relied on excerpts from the Declaration of Independence and Lincoln's inaugural address in 1861, and quotations from Thomas

Aquinas and Daniel Webster. (R. 158-159, 160, 390.) The applicant in answer to specific questions stated that he believed that the decision as to violent overthrow is essentially an individual one, but that the person making the choice should take into account the gravity of the provocation, the chance of his efforts succeeding, the general harm that his action may produce in the community, and whether his view is shared by any appreciable number of people. (R. 161-162.) The following exchange at one of the hearings sheds further light on the applicant's views in this regard:

"Q. It seems to me, the subjective versus the objective standard is quite important in connection with the questions we have been putting to you. If a group of Communists believe fervently, passionately, in the kind of system that is repugnant to us, if the standard is purely subjective, then they would have the right to overthrow the government as quickly as they could, would they not?

"A. No, that is not simply the question, I mean—I do not assume that any fool who decides the Government should be overthrown has the right to do so. I am not saying any group of men, fools or not fools, simply because they decide to overthrow the Government, have a right to do so. I am saying only that under certain circumstances there is a right to overthrow governments.

"Let me give you an example; a couple of examples, of recent date, of two unsuccessful revolutions which I think reflect the general American opinion, I won't say necessarily reflect mine, but the general American opinion. At the end of the war, toward the end of World War II, Hitler's generals made an attempt to overthrow him. You have all heard that. They were unsuccessful. Two years ago the Hungarians made an attempt to overthrow the government. They were unsuccessful. There is no doubt, I think, on the part of the general American population, that both of these

attempts at revolution were legitimate in the sense that there was no principle about the right of revolution being violated here. The only problem that one would have, I suppose, in the general opinion would be in terms of the prudence, circumstances and consequences of the particular situations." (R. 166-167.)

The applicant has further stated to the Committee that he does not believe in the right to use force until peaceful means to redress an evil have been exhausted or appear futile. In relating his views with respect to overthrow to the political situation at the present time, applicant stated that he did not foresee any condition developing where revolution would be either desirable or valuable. (R. 170.)

A majority of the Committee has arrived at the conclusion that the views expressed by the applicant with respect to the right to overthrow the government by force or violence, while strongly libertarian and expressed with an intensity and fervor not necessarily shared by all good citizens, are not inconsistent with those held by many patriotic Americans both at the present time and throughout the course of this country's history and do not in and of themselves reveal any adherence to subversive doctrines. In view of this conclusion there is no need to consider in this connection either *Yates v. U. S.*, 354 U.S. 298, or *Konigsberg v. State Bar of California*, 353 U.S. 252. However, the *Konigsberg* case is necessarily considered in respect to the Committee's authority to ask certain questions of applicant, *infra*, pp. 12-13.

Apart from applicant's views as to the overthrow of the Government by force, certain other views expressed by him in these proceedings bear upon his attitude toward established authority and orderly governmental procedures. The Committee regards these views as relevant to an inquiry into the character and fitness of an applicant for admission to the bar.

One such other matter was the applicant's refusal to deny that circumstances might exist under which he would resist by force Federal or State officials seeking to enforce judgments or decrees in proceedings against him personally which had become final after full review by the highest court having jurisdiction. (R. 174-178, 237-240.) In his language, "I would not care to say there might not be instances where resistance to an officer of the law executing such a mandate might not be improper." (R. 176.) If admitted to the Bar and advising a client, he testified that he would not advise the client to resist by force or other similar means a final judgment or decree against the client, because in his opinion it was his duty to advise the client only "with respect to the legal system as it exists." (R. 177.) "In so far as I am a lawyer, I can tell him what his rights are under the accepted law * * * under the Canons of Ethics I would be derelict in my duty if I presume to do much more than that." (R. 239.) He denied that he was arrogating to himself rights or privileges which he would deny to others as "citizens." (R. 239-240.) He testified that "If, however, he (the client) were thereupon to approach me on some other basis, not as an attorney, there may be other advice I would be willing to give him." (R. 240.) He saw no inconsistency between such an opinion and the taking of an oath loyally to support the Constitution of the State of Illinois and the Constitution of the United States "without any reservation whatsoever." (R. 238.)

These views raise a serious question whether the attitude expressed by applicant toward final court determinations binding upon him and toward attempts to enforce them in accordance with the law is consistent with the oath required of attorneys in Illinois. Upon admission, an attorney is an officer of the courts, and one who

holds such views as the applicant's would fall within the condemnation expressed by the United States Supreme Court in the opinion signed by all the Justices in *Cooper v. Aaron*, 358 U.S. 1, 3 L. ed. 2d 5, and rendered on September 29, 1958:

"No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it." (358 U.S. at p. 8.)

The further attitude expressed by applicant about advising others along the same subversive lines in his capacity as "citizen" as distinguished from his capacity as "attorney," also raises serious questions concerning his capacity to take the oath required of Illinois attorneys. Our Supreme Court in *In re Anastaplo*, 3 Ill. 2d 471, at p. 479, pointed out the importance of the fact in Bar application cases that attorneys hold positions of public trust which give them unique opportunities to impress their views and attitudes upon the public.

Perhaps the major issue presented to the Committee arose from the applicant's continued refusal to answer questions regarding possible Communist or other subversive affiliations. (R. 34, 35-37, 42-43, 46-47, 64, 65, 66, 94-97, 98-99, 105, 172-173, 336.) We felt justified in questioning applicant on such matters for the following reasons:

1. His refusal to respond to such questions in connection with his previous candidacy was undoubtedly the controlling reason why his application was denied by the Committee and was the pivotal point in the decision of the Supreme Court of Illinois affirming the Committee's action.

2. The Committee believes that its right to question the applicant on possible subversive affiliations has not been foreclosed by the *Konigsberg* decision. (*Konigsberg v. State Bar of California*, 353 U.S. 252.) This view is clearly

confirmed by the later decisions of the Supreme Court of the United States in *Lerner v. Casey*, 357 U.S. 468, 2 L. ed. 2d 1423, 78 S. Ct. 1311, and *Beilan v. Board of Education*, 357 U.S. 399, 2 L. ed. 2d 1414, 78 S. Ct. 1317, both of which expressly distinguished the *Konigsberg* case.

3. The Committee was convinced that the applicant's credibility in connection with his answers to questions pertaining to the right of overthrow and the enforceability of judicial decrees should be tested by questioning him about possible subversive beliefs and activities.

4. The Committee believed that the applicant's ability to take the oath in good faith as an attorney of this State could be seriously questioned if he were an active and disciplined member of the Communist Party, especially at this juncture of history. (R. 115-116.) The Committee repeatedly warned the applicant that questions regarding Communist affiliation were viewed as important by the Committee members and that his failure to respond to them could adversely affect his application for admission to the bar. (R. 37, 116-117.) The Committee further reminded applicant that Congress, the Supreme Court of the United States and various legislatures and courts had classified the Communist Party as something separate and distinct from other political parties, and that in several jurisdictions the Party had been branded as a criminal conspiracy. (R. 115-117.) The Committee further stated that it might view a doctrinaire adherence to Communist goals as one thing, but active membership in the Party as quite another, and pointed out that until the applicant gave a candid response to the Committee's questions it could not formulate any judgment on applicant's basic loyalty. (R. 132.)

5. The Committee was directed to report to the Court on the applicant's activities since his original application was denied. The principal way in which the Committee

ascertains the activities in which a candidate has been engaged is by asking him questions.

Notwithstanding the foregoing, the applicant persistently refused to answer questions concerning Communist or other subversive affiliations. To explain his refusal he stated that such inquiries violated fundamental civil rights guaranteed to him by the First and Fourteenth Amendments to the Federal Constitution and by the Constitution of the State of Illinois. He did not rely upon any privilege against self-incrimination. He stated that his political beliefs were not a proper subject of inquiry by the Committee and bore no relevance to the question of his character and fitness.* He objected to any inquiry into such matters since the Committee, in his view, had laid no foundation for such an inquiry and had no evidence before it which would justify what he considered an intrusion into his private beliefs; he did not consider that his views with respect to overthrow of the government or disobedience of judicial decrees furnished any basis for any such questions. (R. 139, 155-157, 173.)

The applicant relies heavily on the *Konigsberg* case to support his refusal to answer questions concerning possible subversive affiliations and activities. We read the *Konigsberg* case to hold that a committee performing functions similar to our own is not entitled to draw an inference of bad moral character merely from the applicant's refusal to answer questions concerning membership in the Communist Party if such refusal is based on a good-faith belief that the United States Constitution prohibited the type of inquiry which the Committee was making and if the reviewing court can "find nothing in the record which indicates that his

*The applicant did not adopt this position at all stages of the hearing. He freely answered portions of the questionnaire dealing with constitutional doctrine and expatiated at length on his belief in violent overthrow.

position was not taken in good faith." (353 U.S. at p. 270.) The Court pointed out that the State Committee of Bar Examiners in California had at no point intimated to Konigsberg that he would be barred from the profession just because he refused to answer relevant inquiries or because he was obstructing the Committee. In the view of the Court the Committee's action was based principally upon inference which it drew from certain of applicant's past utterances, prior membership in the Communist Party and refusal to answer questions bearing upon present membership in the Party. (353 U.S. at p. 266.) The court held that considering the record as a whole such inferences were not permissible. The court expressly left open the question whether Konigsberg's constitutional objections to the Committee's questions were well founded and whether the Committee would be justified in insisting that its questions be answered. (353 U.S. at p. 270.)

The *Konigsberg* case is therefore not determinative in this proceeding. The United States Supreme Court in holding in that case that a committee like ours is not entitled to draw an inference of bad moral character merely from an applicant's refusal to answer questions concerning membership in the Communist Party, if such refusal is based upon a good faith belief that the United States Constitution prohibits the type of inquiry which the committee was making and if the Court could find nothing in the record to indicate bad faith on his part (353 U.S. 252, 270), did not hold that such a condition of a record affirmatively entitled an applicant to certification. Upon determination of the propriety of the questions and the lack of substance in the objections thereto the applicant would be entitled to another opportunity to answer, and if he persisted in his refusal to do so, the committee would not be acting inconsistently with *Konigsberg* in denying a certification.

Since the rehearing was granted herein, the United States Supreme Court decided on June 21, 1958, the cases of *Lerner v. Casey*, 357 U.S. 468; 2 L. ed. 2d 1423, 78 S. Ct. 1311, and *Beilan v. Board of Education of Philadelphia*, 357 U.S. 399, 2 L. ed. 2d 1414, 78 S. Ct. 1317, in which the Court clearly determined the propriety of questions of the kind asked the applicant in these proceedings. We called applicant's attention to these two most recent decisions and offered to him the opportunity to change his testimony in any manner he saw fit in the light of them. (Committee letter to applicant dated September 16, 1958.) He declined. (Applicant's letter to the Committee dated September 23, 1958.) His continued refusal to answer, evidenced by his reply of September 23, 1958, deprives him on this record of any argument of similarity between his status and that of *Konigsberg* and of any benefits from the decision in the *Konigsberg* case.

In *Lerner v. Casey*, *supra*, petitioner, a subway conductor in the New York City Transit System, was discharged by his employer under the New York Security Risk Law on the ground that his refusal, based upon the privilege against self incrimination guaranteed by the Fifth Amendment, to answer a question of his employer as to his membership in the Communist Party, showed that he was of doubtful trust and reliability. Petitioner sued in the New York State Court for reinstatement, attacking his discharge on various grounds, including lack of due process. The New York Supreme Court dismissed the suit and the Appellate Division and Court of Appeals both affirmed. On certiorari the United States Supreme Court also affirmed. Justice Harlan for the majority said:

"In other words, we read the court's opinion as meaning that a finding of doubtful trust and reliability could justifiably be based on appellant's lack of frankness. cf. *Garner v. Board of Public Works*, 341 U.S. 716; *Beilan v. Board of Public Education*, *ante*, p. 399, de-

cided today, just as if he had refused to give any other information about himself which might be relevant to his employment. It was this lack of candor which provided the evidence of appellant's doubtful trust and reliability which under the New York statutory scheme constituted him a security risk. The Court of Appeals went on to reason that had appellant refused, without more, to answer the question, the finding of 'doubtful trust and reliability' would have undoubtedly been permissible, and that the basis for such a finding, in appellant's refusal to answer, was not destroyed by the claim of the Fifth Amendment privilege because the Commissioner was not required to accept that claim as an adequate explanation of the refusal.

"Accepting as we do, these premises of the state court's opinion, we find no constitutional block to its decision sustaining appellant's dismissal from employment . . .

"Nor, as the Court of Appeals stressed, was the claim of possible self-incrimination made the basis for an inference that appellant was a Communist and therefore unreliable. Hence we are not faced here with the question whether party membership may rationally be inferred from a refusal to answer a question directed to present membership where the refusal rests on the belief that an answer might incriminate, cf. *Adamson v. California*, 332 U.S. 46, or with the question whether membership in the Communist Party which might be 'innocent' can be relied upon as a ground for denial of state employment. Cf. *Wieman v. Updegraff*, *supra*; *Konigsberg v. State Bar of California*, 353 U.S. 252; *Schwartz v. Board of Bar Examiners*, 353 U.S. 232.

"We think it scarcely debatable that had there been no claim of Fifth Amendment privilege, New York would have been constitutionally entitled to conclude from appellant's refusal to answer what must be conceded to have been a question relevant to the purposes of the statute and his employment, cf. *Garner v. Board of Public Works*, *supra*, that he was of doubtful trust and reliability. Such a conclusion is not 'so strained

as not to have a reasonable relation to the circumstances of life as we know them.' *Tot v. United States*, 319 U.S. 463, 468. This Court pointed out in *Garner* that a government employee can be required upon pain of dismissal to respond to inquiry probing into matters relevant to his employment, and that present membership in the Communist Party is such a matter. See also *Beilan v. Board of Public Education*, *supra*. Certainly it is not a controlling constitutional distinction that New York, rather than impose on employees, as in *Garner* and *Beilan*, an absolute duty to respond to permissible inquiry upon threat of dismissal for refusal, has in these proceedings held that an employee lacking in candor to his governmental employer evidences doubt as to his trust and reliability. Finally, unlike the situation involved in *Konigsberg v. State Bar of California*, *supra*, there is here no problem of inadequate notice as to the consequences of refusal to answer, for appellant was specifically notified that continued refusal might lead to his dismissal." (See 357 U.S. at pp. 476, 477-8.)

In *Beilan v. Board of Education of Philadelphia*, *supra*, petitioner, a public school teacher, was discharged by the local school board for "incompetency" under the Pennsylvania School Code, because of his refusal, continued after warning that failure to answer might lead to dismissal, to answer a question of his superintendent as to his membership in a Communist political association. On an administrative appeal, the superintendent sustained the local Board, but the County Court set aside the discharge. On appeal by the Board the Pennsylvania Supreme Court reversed and reinstated the discharge. On certiorari the United States Supreme Court affirmed. It held that due process was not violated by petitioner's discharge on the ground of "incompetency" evidenced by petitioner's refusal to answer the request of the superintendent for information as to the teacher's loyalty and as to his activities in certain subversive organizations, such refusal being

based upon the Fifth Amendment and other constitutional objections.

Justice Burton said:

"The only question before us is whether the Federal Constitution prohibits petitioner's discharge for statutory 'incompetency' based on his refusal to answer the Superintendent's questions.

"By engaging in teaching in the public schools, petitioner did not give up his right to freedom of belief, speech or association. He did, however, undertake obligations of frankness, candor and cooperation in answering inquiries made of him by his employing Board examining into his fitness to serve it as a public school teacher. . . .

"The question asked of petitioner by his Superintendent was relevant to the issue of petitioner's fitness and suitability to serve as a teacher . . . He made it clear that he would not answer any question of the same type as the one asked. Petitioner blocked from the beginning any inquiry into his Communist activities, however, relevant to his present loyalty. The Board based its dismissal upon petitioner's refusal to answer any inquiry about his relevant activities—not upon those activities themselves. It took care to charge petitioner with incompetency, and not with disloyalty. It found him insubordinate and lacking in frankness and candor—it made no finding as to his loyalty. . . .

"In the instant case, the Pennsylvania Supreme Court has held that 'incompetency' includes petitioner's 'deliberate and insubordinate refusal to answer the questions of his administrative superior in a vitally important matter pertaining to his fitness.' 386 Pa., at 91, 125 A. 2d, at 331. This interpretation is not inconsistent with the Federal Constitution. . . .

"Our recent decisions in *Slochower v. Board of Education*, 350 U.S. 551, and *Konigsberg v. State Bar of California*, 353 U.S. 252, are distinguishable. . . .

"In the *Konigsberg* case, *supra*, at 259-261, this Court stressed the fact that the action of the State

was not based on the mere refusal to answer relevant questions—rather, it was based on inferences impermissibly drawn from the refusal. In the instant case, no inferences at all were drawn from petitioner's refusal to answer. The Pennsylvania Supreme Court merely equated refusal to answer the employing Board's relevant questions with statutory 'incompetency.'" (357 U.S. at pp. 404-406, 408-409.)

In the instant case, as in *Lerner and Beilan*, and unlike the situation in *Konigsberg*, no problem exists as to inadequate notice of the consequences of a refusal to answer: the applicant was specifically notified both by the Illinois Supreme Court in its opinion in 3 Ill. 2d 471, and by this Committee on rehearing that his continued refusal to answer might lead to the denial of his application. (R. 37, 116-117.)

In the course of the rehearing proceedings, the Committee conducted no independent investigation into applicant's character, reputation or activities. The Committee has no personnel nor other resources for any such investigation. For this very practical reason, the Committee has traditionally asserted the view that it cannot be expected to carry the burden of establishing, by independent investigation, whether or not an applicant possesses the requisite character and fitness for admission to the bar. It is rather for the applicant to establish, on his own behalf, that he possesses the necessary qualifications and it is for the Committee to test, by hearings and inquiry of the applicant, the worth of the evidence which the applicant proffers.

Because the applicant has refused to answer questions, we are unable to report whether his activities since the denial of his original application have included membership, office holding or other activities in the various organizations listed on the Attorney General list of subver-

sive organizations. We are also unable to report what his reputation is among the members of any organization with which he may be affiliated, since he has declined to inform us of his affiliations.

In the instant proceeding a majority of the Committee is of the opinion that applicant's petition for a license should be denied because he has failed to meet the burden which is on him of establishing his proper character and fitness. By refusing to answer questions deemed by the Committee to be relevant, he has thereby failed to establish that he has the necessary character and fitness and the Committee is therefore unable to certify him.

In this connection the Supreme Court in *In re Anastaplo*, 3 Ill. 2d 471, said (pp. 480, 483):

"It is our opinion, therefore, that a member of the Communist Party may, because of such membership, be unable truthfully and in good conscience to take the oath required as a condition for admission to practice, and we hold that it is relevant to inquire of an applicant as to his membership in that party. A negative answer to the question, if accepted as true, would end the inquiry on the point. If the truthfulness of a negative answer were doubted, further questions and information to test the veracity of the applicant would be proper. If an affirmative answer were received, further inquiry into the applicant's innocence or knowledge as to the subversive nature of the organization would be relevant. Under any hypothesis, therefore, questions as to membership in the Communist Party or known subversive 'front' organizations were relevant to the inquiry into petitioner's fitness for admission to the bar. His refusal to answer has prevented the committee from inquiring fully into his general fitness and good citizenship and justifies their refusal to issue a certificate.

"We conclude that the committee's inquiry into petitioner's membership in the Communist Party was relevant to a determination of his good citizenship and his ability to take the oath of lawyer in good conscience, and that petitioner's constitutional rights were not infringed upon by such action. On the present record the petition must be denied."

A majority of the Committee continues to adhere to the views which were the basis of its decision on Anastaplo's prior application and which were expressed by the Supreme Court of Illinois in *In re Anastaplo*, 3 Ill. 2d 471 at 480-483, to the effect that it may properly interrogate an applicant as to membership in the Communist Party or in any other subversive group and that such inquiries are relevant to character and fitness. It believes that an applicant is not protected from such questions by any provisions of the State or Federal Constitutions. An applicant, of course, need not answer the question and cannot be punished for his refusal to respond. But his failure to reply, in our view, (i) obstructs the lawful processes of the Committee, (ii) prevents inquiry into subjects which bear intimately upon the issue of character and fitness, such as loyalty to our basic institutions, belief in representative government and *bona fides* of the attorney's oath and (iii) results in his failure to meet the burden of establishing that he possesses the good moral character and fitness to practice law, which are conditions to the granting of a license to practice law.

We draw no inference of disloyalty or subversion from applicant's continued refusal to answer questions concerning Communist or other subversive affiliations. We do, however, hold that there is a strong public interest in our being free to question applicants for admission to the bar on their adherence to our basic institutions and form of government and that such public interest in the character

of its attorneys overrides an applicant's private interest in keeping such views to himself. By failing to respond to this higher public interest we hold that the applicant has obstructed the proper functions of the Committee. By reason of applicant's own recalcitrance he has failed to demonstrate the good moral character and general fitness to practice law necessary for admission to the Bar. We cannot certify the applicant as worthy of the trust and confidence of the public when we do not know that he is so worthy and when he has prevented us from finding out.

Certain members of the Committee (who are included within the majority who believe that applicant's position for a license should be denied because he has failed to meet the burden which is on him of establishing his proper character and fitness) are of the further opinion that the record demonstrates affirmatively applicant's lack of the character and fitness necessary for admission to the Bar. They base their views upon (i) applicant's refusal, after the *Lerner* and *Beilan* decisions were called to his attention, to modify his refusal to answer the Committee's questions concerning Communist Party and other possible subversive affiliations and (ii) applicant's view that circumstances might exist under which he would not abide by, and might advise other citizens not to abide by, final decrees of a court of law and to resist by force their enforcement by appropriate legal process, when considered in connection with his views as to the overthrow of the government by force and violence.

It is the conclusion of the Committee that the application should be denied.

Respectfully submitted,

COMMITTEE ON CHARACTER AND FITNESS FOR
THE FIRST APPELLATE COURT DISTRICT OF
ILLINOIS.

The following members of the Committee join in the foregoing report:

D. ROBERT THOMAS, *Chairman*,
CHARLES A. BANE,
RICHMOND M. CORBETT,
WALTER H. MOSES,
JOHN M. O'CONNOR, JR.,
FRANCIS J. SEITER,
LEN YOUNG SMITH,
ROBERT A. SPRECHER,
EDMUND A. STEPHAN,
JEROME S. WEISS,
HORACE A. YOUNG.

[Minority Report]

We cannot join in the majority report.

The Supreme Court has asked us to hear evidence on three questions. The Committee is apparently unanimous in the conclusion that nothing in the answers to those three questions reflects adversely upon the applicant. The answers, as stated by the majority, are:

(1) "The views expressed by the applicant with respect to the right to overthrow the government by force or violence, while strongly libertarian and expressed with an intensity and fervor not necessarily shared by all good citizens, are not inconsistent with those held by many patriotic Americans both at the present time and throughout the course of this country's history and do not in and of themselves reveal any adherence to subversive doctrines."

(2) Since his original application was denied, he has been engaged primarily in academic life at the University of Chicago.

(3) He is "well regarded by academic associates, by professors who * * * taught him in school and by members of the Bar who know him personally."

The majority nevertheless finds reasons to deny admission. This is not because of any evidence derogatory to the applicant, for there is none. As the majority states and we agree:

"We have not been supplied with any information by any third party which is derogatory to Anastaplo's character or general reputation. We have received no information from any outside source which would cast any doubt on applicant's loyalty or which would tend to connect him in any manner with any subversive group."

In the face of all of this, how does the majority reach its result? It does so solely because of applicant's refusal to answer certain questions which are considered relevant, and because the burden of proof is on the applicant. The fact that the questions are relevant and the burden of proof on the applicant, does not relieve us of the obligation of considering the entire record and weighing all of the evidence. It does not give us the right to seek reasons to deny admission or to find those reasons in a refusal to answer under the circumstances of this case. In considering the entire record, applicant's refusal to answer is only one factor. It must be analyzed against the entire record and applicant's reasons for his refusal, and not used as an excuse, without more, for denying admission.

The record in this case, fairly read, reveals nothing reflecting adversely on applicant's moral character or reputation, or containing the slightest suggestion of disloyalty. This despite the fact that applicant has been before us at various times for seven and one-half years and has received considerable public attention.

The actual, limited extent of applicant's refusal to answer should be made clear. Applicant has answered fully all questions, including those concerning his political beliefs, except only such questions as were of such a specific nature and intent as—in the very answering—necessarily to reveal adherence or non-adherence to or membership or non-membership in a particular, identifiable organized political or religious group.

On this record, applicant's refusals can have significance only if they have made it impossible for us to determine the questions before us or have evidenced such a disrespect for this Committee, the Court and the community as to reflect on his character. Neither is the case here. His refusals have made it more difficult for us to discharge our duty, but they have not prevented us from doing so or relieved us of that duty.

The applicant did not set out to frustrate the work of the Committee by refusing both to answer and to explain the reasons for his refusal. Instead, he willingly gave us his views and was subjected to a most searching inquiry into his reasons which he explained repeatedly and in detail. His offense, as the majority sees it, is that he believes as a matter of principle, that we cannot constitutionally ask the questions he has refused to answer. He believes further that it is important that he refuse to answer. And he has adhered to these beliefs at a cost to date of seven and one-half years of his professional life.

The worst that can be said about applicant in this regard is that he may be wrong in his beliefs or in carrying them as far as he does. That some of us do not agree with the applicant and others would not be as persistent in our devotion to principle is of no relevance or significance. Nonconformity, if any there be, and devotion to principle

do not reflect adversely on character and are strange grounds for denying admission.

We believe that the applicant is sincere and conscientious in his beliefs, and that his refusal to compromise these beliefs in no way makes his unfit, immoral or of bad character. Honest error or unorthodoxy in political philosophy is not a ground for denial of a license to practice law.

When all is said and done, the majority denies admission because the applicant disagreed with the Committee by refusing to answer and in so doing, made the Committee's work more difficult. This is not a valid ground. We are not infallible and agreement with us is not and should not be a *sine qua non* to admission. And although the applicant's position made our task more difficult and time consuming, it did not prevent us from accomplishing it. We are here for the hard cases and an applicant who presents a hard case should not be punished for doing so, particularly where the difficulty arises from the applicant's adherence to conscientious scruples as to the meaning of the Constitution.

The majority finds support for its decision in an excursion into applicant's attitude toward possible future court orders affecting him, his clients or his friends. Apart from the fact that this goes beyond matters we were directed to examine, we find nothing in these philosophic observations which reflects adversely upon applicant's character or fitness, as we understood those terms.

We do not agree that because the applicant did not enlarge on his views as to the effect of later cases on the *Konigsberg* decision of the Supreme Court of the United States, this in any way detracts from the controlling importance of that case on this one, or, as is suggested,

déprives the applicant of the right to rely on that decision. It is still the law of the land, and despite all distinctions that may be made, the fact is that there was far more basis for the questions put to *Konigsberg* than those put to the applicant here. In *Konigsberg*, there was independent evidence of prior Communist membership and involvement. Here there is absolutely nothing. Yet in *Konigsberg* the applicant was upheld in his refusal to answer questions of the kind involved here.

In any event, assuming we have a right to ask such questions as applicant has refused to answer, we need not insist upon obtaining an answer in response to our exercise of that right in a case where we have no foundation whatsoever for asking such questions except a desire to vindicate the status of the Committee. This is not an adversary proceeding where we sit to see, above all else, to the strict enforcement of our "rights" as against the applicants required to come before us.

It seems contrary to the proper purpose and spirit of this Committee to insist upon an inflexible rule that a refusal of an applicant to answer any question deemed lawful and relevant by the Committee automatically, and without more, forecloses the applicant from the favorable disposition of the Committee. It is, rather, our function, when faced with an applicant who shows some independence of spirit and thought, to display the same humanity, tolerance and common sense with which we pass upon the applications of all the hundreds of other more tractable applicants whom we continue to certify through the years. Accordingly, our function is fulfilled in such cases when we see to it that an applicant who refuses to answer any relevant question has produced the same strong evidence as has this applicant of his good reputation and activities

and has convinced the Committee, after hearings, that his refusal to answer is equally made with complete candor and in good faith and is not arbitrary, devious, or made for ulterior or irrational reasons.

In our view, the applicant has discharged the burden of proof that he has the requisite character and fitness. We know him well from protracted hearings and over-exposure to his view. He has demonstrated that he is a moral and patriotic American and that his views on the right of revolution are without significance. He is well thought of in the community and discharges important responsibilities. Despite the physical burdens of long hearings, applicant conducted himself in a gentlemanly manner and was temperate even in his criticism, particularly if, as he feels, he has been wronged by the Committee.

We now know the applicant is fit and of good character. On this record, it is pure sophistry to hold that his refusals to answer have prevented our determining his character and fitness. To deny admission under these circumstances would be a disservice to the Bar and a violation of the traditional concepts of fairness and due process. To do so under the shelter of burden of proof is a retreat to formalism we are unable to join.

Our conclusion is that the applicant should be granted a certificate of satisfactory character and fitness.

The following members of the Committee join in the foregoing report:

JAMES P. CAREY, JR.,

J. R. CHRISTIANSON,

JAMES E. HASTINGS,

GEORGE N. LEIGHTON,

EDWARD I. ROTHSCHILD,

CALVIN P. SAWYIER.

IV.

**OPINIONS OF THE SUPREME COURT OF ILLINOIS,
1959-1960 (AS SET FORTH IN ILLINOIS OFFICIAL
REPORTER ADVANCE SHEETS, 18 Ill. 2d 182).**

In re George Anastaplo, Petitioner.

Opinions filed November 18, 1959—Rehearing denied January 21, 1960.

Bristow, Schaefer, and Davis, JJ., dissenting.

Petition and Appeal from refusal of Committee on Character and Fitness to grant certificate.

George Anastaplo, of Chicago, petitioner, *pro se*.

Harry Kalven, Jr., and Roscoe T. Steffen, both of Chicago, *amici curiae*.

PER CURIAM: The present proceeding is a sequel to *In re Anastaplo*, 3 Ill. 2d 471. George Anastaplo passed the Illinois bar examination given in August of 1950. Thereafter, following extended hearings before the Committee on Character and Fitness for the First Appellate Court District, the committee, on June 6, 1951, advised Anastaplo that he had failed to prove such qualifications as to character and general fitness as, in the opinion of the committee, would justify his admission to the bar of Illinois.

Anastaplo filed in this court a "Petition and appeal from the refusal of the Committee on Character and Fitness
• • • to sign a favorable certificate for admission to

the practice of law for the applicant and Motion to the Supreme Court of Illinois to provide for the admission of the applicant to the practice of law in the state of Illinois." For the reason that Anastaplo charged that the committee abused its discretion and that certain of his constitutional rights were infringed upon, we found that circumstances existed which should cause the matter to be set down for argument and opinion. (*In re Summers*, 325 U.S. 561, 80 L. ed. 1795, 65 S. Ct. 1307.) The matter was taken upon the record of the hearings before the Committee on Character and Fitness, the report of the committee, Anastaplo's brief and oral argument, briefs of two *amici curiae* and the suggestions of a one-time member of the committee in his behalf.

The crux of the earlier controversy centered upon Anastaplo's refusal to answer inquiries as to whether he was a member of the Communist Party or of any subversive organizations in a list compiled by the United States Department of Justice. When initially interrogated as to whether he was a member of the Communist Party Anastaplo answered that the question was an inquiry into his political beliefs and an "illegitimate question". He made like responses to similar questions in other parts of the record. Based upon these refusals, the committee, upon the basis of its opinion that a member of the Communist Party, because of such membership, might not be able in good faith to take the oath of attorney to support the Federal and State constitutions, thereupon directed questions to Anastaplo to elicit his views in what the committee deemed were "pertinent areas of inquiry. Questioning of Anastaplo brought out his opinion that a member of the Communist Party, otherwise qualified, should be admitted to the practice of law and that he would see nothing contradictory or incompatible between adherence to tenets of that party and the taking of the attorney's

oath to support the constitutions. Anastaplo expressed his belief in the doctrine of revolution and the overthrow of government by force of arms, saying that he would embrace such doctrine if he could not agree with the existing government, or found it unsatisfactory, and felt that force of arms was the only means to attain the end desired. He also stated that such view would not be altered even though the existing government provided for peaceful and orderly means of change. In its report denying Anastaplo a certificate, the committee stated that the views and opinions expressed by Anastaplo on these matters were not the basis of its decision, but that such views increased the importance of his refusal to answer and made more necessary a complete answer upon the subject of membership in the Communist Party, so that the committee could better determine the ability of Anastaplo to take the oath of attorney in good conscience and his good citizenship.

In his appeal to this court, Anastaplo contended that the committee abused its discretion and exceeded its function by inquiring into what he described as his "political views," directly or indirectly. We rejected this contention and held that the committee's inquiry into Anastaplo's membership in the Communist Party was relevant to a determination of his good citizenship and his ability to take the oath of a lawyer in good conscience, and that his constitutional rights were not infringed upon. Accordingly, we concluded that "On the present record the petition must be denied." Anastaplo appealed to the United States Supreme Court, which treated the appeal as a petition for writ of *certiorari*, and denied the petition. (*In re Anastaplo* 348 U.S. 946, 99 L. ed. 740.) The Supreme Court of the United States also denied Anastaplo's motion for admission to the bar of that court in 349 U.S. 903 (1955), 99 L. ed. 1240.

Upon the authority of *Dennis v. United States*, 341 U.S. 494, 95 L. ed. 1137; *American Communications Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 94 L. ed. 925, and *In re Summers*, 325 U.S. 561, we held that inquiries to applicant by the committee concerning his membership in the Communist Party did not violate either the first or the fourteenth amendment to the Federal constitution.

On June 25, 1957, subsequent to the decisions of the United States Supreme Court in *Konigsberg v. State Bar of California*, 353 U.S. 252, 1 L. ed. 2d 819, 77 S. Ct. 722, *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 1 L. ed. 2d 796, and *Yates v. United States*, 354 U.S. 298, 1 L. ed. 2d 1356, 77 S. Ct. 1064, Anastaplo filed with the Committee on Character and Fitness a supplementary petition for rehearing of his application for admission to the bar. On July 2, 1957, the committee denied the petition. Thereafter on September 17, 1957, we entered the following order:

"In 1951 the Committee on Character and Fitness for the First Appellate Court District denied the application of George Anastaplo for admission to the bar of Illinois. This Court affirmed the action of the Committee, (*In re Anastaplo*, 3 Ill. 2d 471,) and the Supreme Court of the United States denied certiorari. (348 U.S. 946.)

"Subsequently the applicant filed with the Committee a petition for rehearing on the basis of certain decisions of the Supreme Court of the United States. The Committee denied this petition.

"The principal question presented by the petition for rehearing concerns the significance of the applicant's views as to the overthrow of government by force in the light of *Konigsberg v. State Bar of California*, 353 U.S. 252, and *Yates v. United States*, 1 L. ed. 1356, 77 S. Ct. 1064.

Additional questions presented concern the applicant's activities since his original application was denied, and his present reputation.

"We are of the opinion that the Committee should have allowed the petition for rehearing and heard evidence on these matters, and the Committee is requested to do so, and to report the evidence and its conclusions."

In obedience to the directions of this court, the committee requested Anastaplo to file the questionnaire required by the committee of all applicants for admission to the bar. Anastaplo's answers, in large measure, supplemented the answers given to the questionnaire filed with the committee on October 26, 1950. Anastaplo also supplied attorney's affidavits and character affidavits from persons acquainted with him. In addition, the committee received communications from various individuals whose names were given as character references by Anastaplo and who furnished information concerning Anastaplo's moral character and general fitness to practice as an attorney.

The committee conducted five extended hearings, commencing February 28, 1958, and ending May 19, 1958. Anastaplo testified and argued at great length, as evidenced by approximately 420 pages of the record covering his oral testimony and argument. The record also contains law review articles, newspaper reprints, other exhibits, and letters from Anastaplo addressed to the committee. During the progress of the hearings, the committee repeatedly advised Anastaplo that he enjoyed the right to be represented by counsel and to call witnesses. He elected to submit his application solely upon his own testimony and argument.

During the interval between denial of his original application and the submission of his second application, Anastaplo had been employed the greater part of the time as an instructor and research assistant at the University of Chicago. The character affidavits and letters of reference supplied by Anastaplo disclose that he is well regarded by his academic associates, by professors who taught him in school and by lawyers who are personally acquainted with him. The committee says that it has not been supplied with any information by any third party which is derogatory to Anastaplo's character or general reputation, and that it has received no information from any outside source which would cast any doubt on Anastaplo's loyalty or which would tend to connect him in any manner with any subversive group. The committee further advises us that it has conducted no independent investigation into Anastaplo's character, reputation or activities. For the very practical reason that the committee has no personnel or other resources for any such investigation, the committee states that it has traditionally asserted the view that it cannot be expected to carry the burden of establishing by independent investigation, whether an applicant possesses the requisite character and fitness for admission to the bar and that a duty devolves upon the applicant to establish that he possesses the necessary qualifications and that it is then the duty of the committee to test, by hearings and questioning of the applicant, the worth of the evidence which he proffers. We agree, and have held that the discretion exercised by the Committee on Character and Fitness will not ordinarily be reviewed. *In re Frank*, 293 Ill. 263.

The committee conducted an extensive inquiry into Anastaplo's belief in the right to overthrow the government by force and violence. His testimony in this regard does

not require narration since a majority of the committee concluded that while the views expressed by Anastaplo, while strongly libertarian and expressed with an intensity and fervor not necessarily shared by all good citizens, are not inconsistent with those held by many patriotic Americans both at the present time and throughout the course of this country's history and do not and of themselves reveal any adherence to subversive doctrines. Accordingly, the committee quite properly decided that although, in the light of the quoted conclusion, there was no need to consider in this connection either *Yates v. United States*, 354 U.S. 298, or *Konigsberg v. State Bar of California*, 353 U.S. 252, the *Konigsberg* case necessarily required consideration, with respect to committee's authority to ask Anastaplo questions concerning Communist or other subversive affiliations and activities.

The committee regarded Anastaplo's views bearing upon his attitude toward established authority and orderly governmental procedures as relevant to an inquiry into his character and fitness for admission to the bar. First, Anastaplo declined to deny that circumstances might exist under which he would resist by force Federal or State officers seeking to enforce judgments or decrees in proceedings against him personally which had become final after full review by the highest court having jurisdiction. Anastaplo testified: "I would not care to say there might not be instances where resistance to an officer of the law executing such a mandate might not be improper." He testified, further, that if admitted to practice and advising a client, he would not advise the client to resist by force or other similar means a final judgment or decree against the client, because, in his opinion, it was his duty to advise the client only "with respect to the legal system as it exists. In so far as I am a lawyer, I can tell him what his rights are under the accepted law . . . under the Canons of

Ethics I would be derelict in my duty if I presume to do much more than that." Although disclaiming that he was arrogating to himself rights or privileges which he would deny to others as "citizens," he testified that "If, however, he [the client] were thereupon to approach me on some other basis, not as an attorney, there may be other advice I would be willing to give him." Anastaplo asserted that he saw no inconsistency between such an opinion and the taking of an oath to support the Federal and State constitutions "without any reservations whatsoever."

The foregoing views, according to the committee's report, raise a serious question whether the attitude expressed by Anastaplo toward final court determinations binding upon himself and toward attempts to enforce them conformably to the law is consistent with the oath required of attorneys in this State. An attorney is an officer of the courts. (*In re Day*, 181 Ill. 73.) In *Cooper v. Aaron*, 358 U.S. 1, 3 L. ed. 2d 5, the United States Supreme Court said, at page 8: "No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it."

The committee's report also suggests that Anastaplo's attitude with respect to advising others along the same subversive lines in his capacity as "citizen" in contradistinction to his capacity as "attorney" raises additional serious questions concerning his capacity to take the oath required of attorneys in this State. See: *In re Anastaplo*, 3 Ill. 2d 471, at page 479.

The major issue presented to the committee arose from the applicant's continued refusal to answer questions regarding possible Communist or other subversive affiliations. In our first opinion in this case, we said in 3 Ill. 2d 471, at page 478:

“Neither the committee nor this court, faced with the question of whether membership in the Communist Party is relevant to a determination of petitioner’s good citizenship and his ability to take the oath of lawyer in good conscience, need be oblivious to the existence of that party and its established conspiratorial nature, nor to the view in which it is held by the people of this country. Aside from the fact that membership in an organization advocating the forceful overthrow of our government would give rise to questions concerning the sincerity of an applicant’s oath of loyalty, it is proper to consider that the lawyer, as an officer of the court, holds a position of public trust, or at least of semipublic trust. . . . While technically not a governmental employee, a lawyer meets on common ground with one so employed, in that loyalty to the constitution is an inalienable condition to their service. In either case, Communist Party membership or communist activity is totally incompatible with such loyalty.

“It is our opinion, therefore, that a member of the Communist Party may, because of such membership, be unable truthfully and in good conscience to take the oath required as a condition for admission to practice, and we hold that it is relevant to inquire of an applicant as to his membership in that party. A negative answer to the question, if accepted as true, would end the inquiry on the point. If the truthfulness of a negative answer were doubted, further questions and information to test the veracity of the applicant would be proper. If an affirmative answer were received, further inquiry into the applicant’s innocence of knowledge as to the subversive nature of the organization would be relevant. Under any hypothesis, therefore, questions as to membership in the Communist Party or known subversive ‘front’ organizations were relevant to the inquiry into petitioner’s fitness for admission to the bar. His

refusal to answer has prevented the committee from inquiring fully into his general fitness and good citizenship and justifies their refusal to issue a certificate."

We reaffirm our adherence to the foregoing views.

In *Orloff v. Willoughby*, 345 U.S. 83 (1953), 97 L. ed. 842, the petitioner, who had been inducted under the Doctor's Draft Act, brought *habeas corpus* proceedings for his discharge from Army because he had not been assigned to the specialized duties nor given the commissioned rank to which he claimed to be entitled by the circumstances of his induction. The petitioner had refused to answer the question "Are you now or have you ever been a member of the Communist Party, U.S.A., or any Communist Organization?" in connection with his application for a commission. In affirming the denial of the writ, the Supreme Court (Justice Jackson) said at page 91: "Could this Court, whatever power it might have in the matter, rationally hold that the President must, or even ought to, issue the certificate to one who will not answer whether he is a member of the Communist Party? It is argued that Orloff is being punished for having claimed a privilege which the Constitution guarantees. No one, at least no one on this Court which has repeatedly sustained assertion by Communists of the privilege against self-incrimination, questions or doubts Orloff's right to withhold facts about himself on this ground. No one believes he can be punished for doing so. But the question is whether he can at the same time take the position that to tell the truth about himself might incriminate him and that even so the President must appoint him to a post of honor and trust. We have no hesitation in answering that question 'No'."

In *Lerner v. Casey*, 357 U.S. 468 (1958), 2 L. ed. 2d 1423, petitioner, a subway conductor in the New York City

Transit System, was discharged by his employer under the New York Security Risk Law on the ground that his refusal, based upon the privilege against self incrimination guaranteed by the fifth amendment, to answer a question of his employer as to his membership in the Communist Party, showed that he was of doubtful trust and reliability. Petitioner sued in the New York State court for reinstatement, attacking his discharge on various grounds, including lack of due process. The New York supreme court dismissed the suit and the Appellate Division and Court of Appeals both affirmed. On *certiorari*, the United States Supreme Court also affirmed. Justice Harlan for the majority said, at pages 476-8:

"In other words, we read the court's opinion as meaning that a finding of doubtful trust and reliability could justifiably be based on appellant's lack of frankness, *cf. Garner v. Board of Public Works*, 341 U.S. 716; *Beilan v. Board of Public Education*, *ante*, p. 399, decided today, just as if he had refused to give any other information about himself which might be relevant to his employment. It was this lack of candor which provided the evidence of appellant's doubtful trust and reliability which under the New York statutory scheme constituted him a security risk. The Court of Appeals went on to reason that had appellant refused, without more, to answer the question, the finding of 'doubtful trust and reliability' would have undoubtedly been permissible, and that the basis for such a finding, in appellant's refusal to answer, was not destroyed by the claim of the Fifth Amendment privilege because the Commissioner was not required to accept that claim as an adequate explanation of the refusal.

"Accepting, as we do, these premises of the state court's opinion, we find no constitutional block to its decision sustaining appellant's dismissal from employment . . .

Nor, as the Court of Appeals stressed, was the claim of possible self-incrimination made the basis for an inference that appellant was a Communist and therefore unreliable. Hence we are not faced here with the question whether party membership may rationally be inferred from a refusal to answer a question directed to present membership where the refusal rests on the belief that an answer might incriminate, *cf. Adamson v. California*, 332 U.S. 46, or with the question whether membership in the Communist Party which might be 'innocent' can be relied upon as a ground for denial of state employment. *Cf. Wieman v. Updegraff*, *supra*; *Konigsberg v. State Bar of California*, 353 U.S. 252; *Schwartz v. Board of Bar Examiners*, 353 U.S. 232.

"We think it scarcely debatable that had there been no claim of Fifth Amendment privilege, New York would have been constitutionally entitled to conclude from appellant's refusal to answer what must be conceded to have been a question relevant to the purposes of the statute and his employment, *cf. Garner v. Board of Public Works*, *supra*, that he was of doubtful trust and reliability. Such a conclusion is not 'so strained as not have a reasonable relation to the circumstances of life as we know them.' *Tot v. United States*, 319 U.S. 463, 468. This Court pointed out in *Garner* that a government employee can be required upon pain of dismissal to respond to inquiry probing into matters relevant to his employment, and that present membership in the Communist Party is such a matter. See also *Beilan v. Board of Public Education*, *supra*. Certainly it is not a controlling constitutional distinction that New York, rather than impose on employees, as in *Garner* and *Beilan*, an absolute duty to respond to permissible inquiry upon threat of dismissal for refusal, has in these proceedings held that an employee lacking in candor to his governmental employer evidences doubt as to his trust and

reliability. Finally, unlike the situation involved in *Konigsberg v. State Bar of California*, *supra*, there is here no problem of inadequate notice as to the consequences of refusal to answer, for appellant was specifically notified that continued refusal might lead to his dismissal."

In *Beilan v. Board of Public Education*, 357 U.S. 399, 2 L. ed. 2d 1414, petitioner, a public school teacher, was discharged by the local school board for "incompetency" under the Pennsylvania School Code because of his refusal, continued after warning that failure to answer might lead to dismissal, to answer a question of his superintendent as to his membership in a Communist political association. On an administrative appeal, the superintendent sustained the local board, but the county court set aside the discharge. On the appeal by the board the Pennsylvania Supreme Court reversed and reinstated the discharge. On *certiorari*, the United States Supreme Court affirmed. It held that due process was not violated by petitioner's discharge on the ground of "incompetency" evidenced by petitioner's refusal to answer the request of the superintendent for information as to the teacher's loyalty and as to his activities in certain subversive organizations, such refusal being based upon the fifth amendment and other constitutional objections.

Justice Burton, who had voted with the majority in the *Konigsberg* case, said, at pages 404-6, 408-9: "The only question before us is whether the Federal Constitution prohibits petitioner's discharge for statutory 'incompetency' based on his refusal to answer the Superintendent's questions.

"By engaging in teaching in the public schools, petitioner did not give up his right to freedom of belief, speech or association. He did, however, undertake obligations of

frankness, candor and cooperation in answering inquiries made of him by his employing Board examining into his fitness to serve it as a public school teacher.

• • •

"The question asked of petitioner by his Superintendent was relevant to the issue of petitioner's fitness and suitability to serve as a teacher. • • • He made it clear that he would not answer any question of the same type as the one asked. Petitioner blocked from the beginning any inquiry into his Communist activities, however relevant to his present loyalty. The Board based its dismissal upon petitioner's refusal to answer any inquiry about his relevant activities—not upon those activities themselves. It took care to charge petitioner with incompetency, and not with disloyalty. It found him insubordinate and lacking in frankness and candor—it made no finding as to his loyalty.

• • •

"In the instant case, the Pennsylvania Supreme Court has held that 'incompetency' includes petitioner's 'deliberate and insubordinate refusal to answer the questions of his administrative superior in a vitally important matter pertaining to his fitness.' 386 Pa. at 91, 125 A. 2d at 331. This interpretation is not inconsistent with the Federal Constitution.

• • •

"Our recent decisions in *Slochower v. Board of Higher Education*, 350 U.S. 551, and *Konigsberg v. State Bar of California*, 353 U.S. 252, are distinguishable. • • •

"In the *Konigsberg case*, *supra*, at 259-261, this Court stressed the fact that the action of the State was not based on the mere refusal to answer relevant questions—rather, it was based on inferences impermissibly drawn from the refusal. In the instant case, no inferences at all were drawn

from petitioner's refusal to answer. The Pennsylvania Supreme Court merely equated refusal to answer the employing Board's relevant questions with statutory 'incompetency.' "

In the instant case, as in *Lerner and Beilan*, and unlike the situation in *Konigsberg*, no problem exists as to inadequate notice of the consequences of a refusal to answer; the applicant was specifically notified both by the Illinois Supreme Court in its opinion in 3 Ill. 2d 471, and by the committee on rehearing that his continued refusal to answer might lead to the denial of his application.

In *Barenblatt v. United States*, 3 L. ed. 2d 1115, 79 S. Ct. 1081 (1959), the petitioner was convicted of contempt by the district court for refusal to answer certain questions before a subcommittee of the Committee on Un-American Activities of the House of Representatives. Two of the questions were "Are you now a member of the Communist Party?" and "Have you ever been a member of the Communist Party?" The Court of Appeals affirmed but the Supreme Court vacated the judgment and remanded the case to the Court of Appeals for reconsideration in light of *Watkins v. United States*, 354 U.S. 178 (1957), 1 L. ed. 2d 1273. The Courts of Appeals reaffirmed the conviction and the Supreme Court affirmed. Justice Harlan said at pages 1129-1131 (L. ed.):

"That Congress has wide power to legislate in the field of Communist activity in this Country, and to conduct appropriate investigations in aid thereof, is hardly debatable. The existence of such power has never been questioned by this Court, and it is sufficient to say, without particularization, that Congress has enacted or considered in this field a wide range of legislative measures, not a few

of which have stemmed from recommendations of the very Committee whose actions have been drawn in question here. In the last analysis this power rests on the right of self-preservation, 'the ultimate value of any society,' *Dennis v. United States*, 341 U.S. 494, 95 L. ed. 1137. Justification for its exercise in turn rests on the long and widely accepted views that the tenets of the Communist Party include the ultimate overthrow of the Government of the United States by force and violence, a view which has been given formal expression by the Congress.

"On these premises, this Court in its constitutional adjudications has consistently refused to view the Communist Party as an ordinary political party, and has upheld federal legislation aimed at the Communist problem which in a different context would certainly have raised constitutional issues of the gravest character. See, e.g., *Carlson v. Landon*, 342 U.S. 523, 96 L. ed. 547, 72 S. Ct. 525;; *Galvan v. Press*, 347 U.S. 522, 98 L. ed. 911, 74 S. Ct. 737. On the same premises this Court has upheld under the Fourteenth Amendment state legislation requiring those occupying or seeking public office to disclaim knowing membership in any organization advocating overthrow of the Government by force and violence, which legislation none can avoid seeing was aimed at membership in the Communist Party. See *Gerende v. Board of Supervisors of Elections*, 341 U.S. 56, 95 L. ed. 745, 71 S. Ct. 565; *Garner v. Board of Public Works*, 341 U.S. 716, 95 L. ed. 1317, 71 S. Ct. 909. See also *Beilan v. Board of Public Education*, 357 U.S. 399, 2 L. ed. 2d 1414, 78 S. Ct. 1317; *Lerner v. Casey*, 357 U.S. 468, 2 L. ed. 2d 1423, 78 S. Ct. 1311; *Adler v. Board of Education*, 342 U.S. 485, 96 L. ed. 517, 72 S. Ct. 380. Similarity, in other areas, this Court has recognized the close nexus between the Communist Party and violent overthrow of government. See *Dennis v. United*

States, supra; American-Communication Ass'n, C.I.O. v. Douds, supra. To suggest that because the Communist Party may also sponsor peaceable political reforms the constitutional issues before us should now be judged as if that Party were just an ordinary political party from the standpoint of national security, is to ask this Court to blind itself to world affairs which have determined the whole course of our national policy since the close of World War II, affairs to which Judge Learned Hand gave vivid expression in his opinion in *United States v. Dennis*, 2 Cir.) 183 F. 2d 201, 213, and to the vast burdens which these conditions have entailed for the entire Nation.

“ . . . An investigation of advocacy of or preparation for overthrow certainly embraces the right to identify a witness as a member of the Communist Party, see *Barsky v. United States*, 83 App. D.C. 127, 167 F. 2d 241, and to inquire into the various manifestations of the Party's tenets. The strict requirements of a prosecution under the Smith Act, see *Dennis v. United States, supra*, and *Yates v. United States*, 354 U.S. 298, 1 L. ed. 1356, 77 S. Ct. 1064, are not the measure of the permissible scope of a congressional investigation into 'overthrow,' for of necessity the investigatory process must proceed step by step.”

In *Uphaus v. Wyman*, 3 L. ed. 2d 1090, 79 S. Ct. 1040 (1959), the appellant, the executive director of World Fellowship, Inc., was adjudged in contempt by a New Hampshire county court for refusal to produce in connection with a State subversive inquiry a list of the guests attending the organization's summer camp. The New Hampshire Supreme Court affirmed the judgment and the Supreme Court of the United States also affirmed. Justice Clark said at pages 1096-1098 (L. ed.): “The interest of the guests at World Fellowship in their associational

privacy having been asserted, we have for decision the federal question of whether the public interests overbalance these conflicting private ones. Whether there was 'justification' for the production order turns on the 'substantiality' of New Hampshire's interest in obtaining the identity of the guests when weighed against the individual interests which the appellant asserts. *National Association for Advancement of Colored People v. State of Alabama*, 357 U.S. 449 (1958). * * * The Attorney General sought to learn if subversive persons were in the State because of the legislative determination that such persons, statutorily defined with a view toward the Communist Party, posed a serious threat to the security of the State. The investigation was, therefore, undertaken in the interest of self-preservation, 'the ultimate value of any society.' *Dennis v. United States*, (1951), 341 U.S. 494, 509, 95 L. ed. 1137, 71 S. Ct. 857. This governmental interest outweighs individual rights in an associational privacy which, however real in other circumstances, cf. *National Association for Advancement of Colored People v. State of Alabama*, *supra*, were here tenuous at best."

In our earlier opinion, (3 Ill. 2d 471,) we said at page 482: "Further, in regard to the contention that petitioner's right of free speech has been infringed upon by the inquiries of the committee, we may also consider the established principle of this jurisdiction that the practice of law is a privilege, not a right. In granting that privilege we may impose any reasonable conditions within our control and if an applicant does not choose to abide by such conditions he is free to retain his beliefs and go elsewhere. Among other things, the granting of the privilege to practice law in this State is conditioned upon proof by the applicant of his good moral character, of his general fitness to practice law and of his good citizenship, and upon the taking of an oath to support the State and Federal con-

stitutions. Such conditions are almost universal in this land and, so far as we can ascertain, their reasonableness has never been attacked. When an applicant, knowing of such conditions, applies for admission and signifies that he will take the oath of lawyer, we think it inconsistent with the privilege he seeks that he should be permitted to defeat pertinent inquiry into his ability to fulfill such conditions by any claim of the right of speech."

In the case of *In re Isserman*, 345 U.S. 286 (1953), 97 L. ed. 1013, the respondent was one of the attorneys for the defendants whose convictions were affirmed in *Dennis v. United States*, 341 U.S. 494 (1951). At the conclusion of the trial he was convicted for contempt of court, which was affirmed in *Sacher v. United States*, 343 U.S. 1 (1952). The Supreme Court of New Jersey disbarred the respondent, and the Supreme Court of the United States then issued a rule for the respondent to show good cause why he should not be disbarred in that court. In disbarring the respondent, the Supreme Court (Chief Justice Vinson) said at page 289: "Our rule puts the burden upon respondent to show good cause why he should not be disbarred. * * * There is no vested right in an individual to practice law. Rather there is a right in the Court to protect itself, and hence society, as an instrument of justice. That to the individual disbarred there is a loss of status is incidental to the purpose of the Court and cannot deter the Court from its duty to strike from its rolls one who has engaged in conduct inconsistent with the standard expected of officers of the Court."

The Committee on Character and Fitness drew no inference of disloyalty or subversion from Anastaplo's consistent refusals to answer questions concerning Communist or other subversive affiliations. We agree with the committee that a strong public interest supports the interrogation of applicants for admission to the bar on their adher-

ence to our basic institutions and form of government and that this public interest in the character of its attorneys overrides an applicant's purely personal interest in keeping such views to himself. In the light of *Barenblatt v. United States*, 3 L. ed. 2d 1115, 79 S. Ct. 1081, alone, the relevancy of an inquiry as to whether an applicant for admission to the bar is a member of the Communist Party is no longer debatable. Decisions of the United States Supreme Court since *In re Anastaplo*, 3 Ill. 2d 471, fortify our earlier conclusion that a determination as to whether an applicant can in good conscience take the attorney's oath to support and defend the constitutions of the United States and the State of Illinois is impossible where he refuses to state whether he is a member of a group dedicated to the overthrow of the government of the United States by force and violence. By failing to respond to the higher public interest, Anastaplo obstructed the proper functions of the Committee on Character and Fitness. By virtue of his own recalcitrance he failed to demonstrate the good moral character and general fitness to practice law necessary for admission to the bar of this State.

The report of the Committee on Character and Fitness is confirmed.

Report confirmed.

Mr. JUSTICE BRISTOW, dissenting:*

I must dissent from the majority opinion on the ground that it deprives the applicant of due process of law under the Federal constitution by denying him admission to the bar in the absence of a scintilla of derogatory evidence to mar the substantial record of his good moral character, and

* Corrections of the Advance Sheets version of this dissenting opinion have been supplied by Mr. Justice Bristow. Cf. 163 N.E. 2d 429 Advance Sheets.

is in direct conflict with the decisions of the United States Supreme Court in *Konigsberg v. State Bar of California*, 353 U.S. 252, 1 L. ed. 2d 810, and *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 1 L. ed. 2d 796.

The constitutional issue in this cause is not, as the *per curiam* opinion implies, whether the committee's questions on political or subversive affiliation were constitutional. The issue is rather, even if Anastaplo were wrong about the impropriety of such questions, whether his good-faith refusal to answer them, on the ground that the first and fourteenth amendments of the Federal constitution barred such inquiry, is a sufficient basis for denying him admission to the bar for failure to establish good moral character. That issue has been determined by the United States Supreme Court in the *Konigsberg* case, which the majority opinion refuses to follow.

Before considering that case or the authorities cited in the majority opinion, I must point out that while I am no less sensitive to the very real danger of Communist infiltration in the bar than is the *per curiam* opinion, I do not believe, as the majority opinion does, that an indictment of the Communist Party, however justified, or a reiteration of the lawyer's obligation to his country, or a warning that the nation must have power to protect itself, however appropriate, is any substitute for evidence against George Anastaplo's moral character. Moreover, I am constrained to call attention to the distorted picture of applicant, which the *per curiam* opinion endeavors to create.

The opinion at the outset tries to create the taint that applicant believes in a subversive political philosophy by quoting isolated statements out of context from the 1951 record—which is not even before this court—and by completely omitting applicant's statements respecting the right

to revolution in the present record. The opinion omits applicant's statement that his views on the right to revolution are, and have been, the same as those embodied in the Declaration of Independence and advanced by Lincoln and Daniel Webster in writings set forth in the present record. Nor does the opinion refer to applicant's unequivocal statement in the record: "But as I said when I first appeared before the full committee on January 5, 1951, I do not think anyone would be justified at a time such as this, when the normal processes of government permit reasonable and peaceful change, to participate in action leading to the overthrow of the government. The Committee must realize that I would be no less reluctant than they to see the right of revolution exercised, except in most extreme circumstances. I trust that my position and what I have contributed to its defense indicate an abiding commitment to constitutional government."

Instead, the opinion dismisses such testimony summarily with the statement that applicant's views do not now require narration because the committee did not find them objectionable, after leaving the taint from the isolated statements in the prior record.

The *per curiam* opinion clutches at straws by even referring to Anastaplo's views on resistance to a court decree as grounds for denying him admission to the bar, in view of his unequivocal statement that he would resist a court decree only under circumstances where constitutional government has been subverted, so that resistance would really be aimed at restoring the constitution and supporting it without reservation. Surely this is no war against the constitution, as the *per curiam* opinion implies. Even the minority report of the committee frankly regarded this matter of resistance to a court decree as a far fetched ground for excluding applicant, particularly in view of his own exemplary conduct during the course of his bar ad-

mission litigation these past 9 years, which is the best evidence of his reaction to court orders.

I could not, within the confines of this dissenting opinion, summarize the hours of questions, answers and arguments revealing all of applicant's views. I have already alluded to some of them. However, since the majority opinion has sought to give a distorted picture of those views and of the nature of the proceedings, I wish to call attention to some of the questions and answers which cast light on this matter.

At the very first session, applicant was asked whether he was a member of any nationality organization. After he replied that he was not, he was asked whether he was a member of a nationality organization that had been designated by the Attorney General as subversive. Applicant refused to answer, explaining that when the question designated the organization as subversive, its intent was to elicit information about political affiliations. To such inquiry he must object on the ground that it infringed his rights under the first and fourteenth amendments, was beyond the province of a Character and Fitness Committee, and, more particularly, was outside of the terms of the Supreme Court rehearing order of 1957. He pointed out that if the committee was interested in eliciting information, it already had the answer to this question, since he had just stated that he was not a member of *any* nationality organization.

In response to the query, "Are you refusing for fear that if you did answer one way or another we might be able to check and find that you have committed perjury," applicant stated, "That is not my fear." He added, "With reference to perjury, it is irrelevant to this situation as is any reference to the Fifth Amendment."

He explained that he would refuse to answer on constitutional principles all questions relating to political affiliations, including those with the Democratic and Republican parties, as well as with any and all organizations on the Attorney General's list, including the Communist Party, the K.K.K., or the Silver Shirts of America, even if the answers reflected favorably on him. He stated: "I would rather be rejected by this Committee if this question becomes crucial by taking a firm position on constitutional principles, than be accepted by, seeming to take it, and at the same time taking a back door."

Applicant added the observation that the committee, in pursuing this line of inquiry, was asking questions the answers to which it had very little doubt about. In support of that assertion he referred to a statement in a document, identified under oath as accurate, apparently reporting the admission of a Justice of this Court that at the last hearing "no one of the Committee or the Court ever thought that he [Anastaplo] was a Communist." Applicant also reiterated that the committee had nothing in the record originally, or during the course of the intervening 7 or 8 years, to justify this line of inquiry or to indicate that he would not take his oath seriously and in good faith. In this connection, a spokesman for the committee admitted: "No one has stated to this committee that you are or have ever been a Communist, or a member of the Ku Klux Klan, or a member of the organizations listed as subversive on the Attorney General's list."

Consequently, applicant moved that the committee desist from this line of inquiry, which was beyond the Supreme Court mandate, was neither relevant, nor for the alleged purpose of inquiring into areas it might otherwise be uncertain about, was being pursued only to induce him to assert his constitutional objections, and was thereby highly prejudicial. The committee denied his motion.

In response to the admonition by the committee that his refusal to answer the question whether he was a member of the Communist Party "may have serious consequences," Anastaplo replied, "Am I ineligible because I take the dissents of certain members of the Supreme Court seriously?" He then pointed out that in the *Konigsberg* and *Schwabe* cases (353 U.S. 252; 353 U.S. 232) even the inajority of the court supported his interpretation of the law, whereby refusal to answer the questions on the grounds asserted by him would, at most, constitute merely one piece of evidence in the record. He argued that such refusal would not necessarily be adverse nor warrant rejection. His position is best stated in his letter to the committee on March 27, 1958, which is included in the record:

"Is one not obliged in the interest of good advocacy and judicial integrity to resist strenuously, even at the risk of incurring official displeasure, unconstitutional disregard of the rule of law? May not, in fact, such resistance reflect the best traditions of the bar, and thereby provide the best evidence that a character committee can desire with respect to an applicant's qualification for the practice of law?"

This precise point, that refusal to answer may be indicative of good character, is evident in this record. Applicant courageously and properly refused to answer the unconstitutional religious inquiries—i.e., whether he believed in a Deity, or eternal punishment as a sanction for his oath. He stated that he would respect his duties as an attorney, with or without the oath, but did not care to speak about whether there were any religious sanctions, such as the fear of eternal punishment, back of his oath, or whether he believed in a Deity, on the grounds that the constitution barred such inquiries. This line of inquiry, persisted in since the very first session, and apparently based upon an 1856 decision, was later admitted by the committee to be improper and unconstitutional since 1870.

The *per curiam* opinion completely overlooked this portion of the record. I cannot follow that course, particularly since the record shows that applicant's refusal to answer these religious questions had so prejudiced the committee that one member stated that the refusal to answer had a "substantial bearing on his [applicant's] fitness to practice law." Such prejudice could hardly be wiped out by the statement of the chairman that these improper questions would not be taken into consideration.

The majority opinion also ignored applicant's argument in support of his refusal to answer the political affiliations questions, that the avowed Communist of the type the committee would want to ferret out of the profession as a menace to our government would have little difficulty in compromising constitutional principles and in giving the desired answers, and that the approach of the committee was effective only in discouraging applicants to stand by principles. I find merit in this argument.

The majority opinion makes no reference to applicant's closing arguments, which I find indicative of his views on our form of government, and the obligation of the lawyer to that government. Here, the applicant first reviewed this cause from its inception, pointing out that the original committee action in 1951 reflected the tenor of the times, when groups tried to outdo each other in hunting possible subversives, and explaining that the Illinois Supreme Court was misled into sustaining the committee's action by the suppression and distortion of the sequence of evidence. He reiterated the lack of foundation for the affiliation inquires, the legal arguments supporting his position, with particular emphasis on the *Konigsberg* record and decision. Finally, he emphasized the basic tenets of our republican government and the obligations of the bar to preserve them, and to lead the nation by precept and example.

In addition to these significant omissions in the *per curiam* opinion, which give a completely misleading impression of the applicant and the hearings, I must also take issue with the scant attention paid by the *per curiam* opinion to the character affidavits and letters of reference submitted to the committee. In my opinion the court should have given considerable weight to these affidavits, as did the United States Supreme Court in the *Schwabe* and *Konigsberg* cases (353 U.S. 232, 244, 1 L. ed. 2d 810; 353 U.S. 252, 265, 1 L. ed. 2d 796), particularly since they were submitted at the committee's request, on their forms, and were presented by persons of stature in the legal profession and other fields, who do not bandy about tributes such as were paid to applicant's honesty, integrity, general conduct and character traits qualifying him for the practice of law.

The affiants included Professor Alexander Meiklejohn, Professor Emeritus of the University of Wisconsin and past-president of Amherst College, in whose name the American Association of University Professors established an Annual Award; Professor Malcolm Sharp, professor of law at the University of Chicago; Professor Roscoe Steffen, professor of law at Yale University and the University of Chicago, and advocate for the Department of Justice before the United States Supreme Court; Professor Yves Simon, formerly of Notre Dame and currently professor of philosophy at the University of Chicago, and recipient of the Spellman-Aquinas Medal for excellence in philosophy from the American Catholic Philosophical Association; Richard Weaver of the University of Chicago faculty and editorial writer for *Modern Age*, a conservative review. Other affiants include a former chairman of the Character and Fitness Committee; a lawyer who authored a text on the canons of ethics, and contributed substantially to bar

association work; a minister, the Dean of University College, and others who supervised Anastaplo's work. These affiants praised applicant's character unstintingly. We note some of the comments, which are representative of the tenor of the affidavits.

Professor Meiklejohn attested: "He [Anastaplo] is intellectually able, a hard, thorough student and moved by high devotion to the principles of freedom and justice . . . unqualifiedly worthy of the highest trust and confidence."

Professor Sharp attested: "His [Anastaplo's] reputation in these respects [for honesty, integrity and general conduct] is of the highest. No question has ever been raised about his honesty or his integrity, and his general conduct, characterized by friendliness, quiet independence, industry and courage, is reflected in his reputation . . . His fellow students respect him. He is in every way among the very best of the students I have seen in my teaching experience."

Richard Weaver attested to applicant's unusual intelligence, fairness and personal modesty, and patriotism in the old-fashioned sense, as well as his sympathetic understanding of affiant's conservatism. "Everything I know about applicant leaves me feeling that he is an unusually intelligent, balanced and helpful American citizen."

Professor Yves Simon characterized Anastaplo by "intelligence, conscientiousness, sincerity and integrity," and concluded, "I consider Anastaplo to be a young man of the most distinguished and lofty moral character."

Dean Donohue of University College, where Anastaplo taught, refers to his honesty as "admirable and unequivocal," and to his integrity as "perhaps even over rigid for our culture."

Robert Coughlan, Anastaplo's supervisor at the Industrial Relations Center, attested: "I would recommend him without the slightest reservation for any position involving the highest and most sacred trust. If admitted to the American Bar, he could do nothing that would not reflect glory on that institution."

Attorney William Trumbull attested: "Affiant has found applicant to exhibit in all respects an exceptionally high degree of honor and integrity and profound loyalty to his country, its form of government and its ideals and to enjoy an excellent reputation for good moral character."

In addition to this evidence, I believe that a review of the career of George Anastaplo will also cast light upon his character and fitness.

This record shows that George Anastaplo was born in 1925, in St. Louis, Missouri, where he secured his elementary school education; that the family moved to Carterville, Illinois, where he attended high school; and that he attended the University of Illinois for some three months before enlisting in the Air Corps, where he attained the rank of Second Lieutenant, and served some 38 months in the Pacific, European and North African theatres of war. He came out of service in February, 1947, and was attached to the Inactive Reserves until his resignation some few years ago. He was accepted by the University of Chicago for the Fall Term of 1947, and during 6 of the intervening months he attended Southern Illinois University. He secured an A.B. degree from the University of Chicago one year later, after carrying a double schedule of classes, and then attended law school. He passed the bar examination in the fall of 1950, and was graduated from law school in 1951.

After this court denied his application for admission to the bar, he, his wife, whom he married in 1949, and their child had a brief trip to Paris, where he enrolled at the Sorbonne. From there they went to Dallas, Texas, where his wife's family resided. During their sojourn there, Anastaplo took a course in oil-and-gas law. At the end of 1951 the family returned to Chicago, and Anastaplo began working at the Industrial Relations Center on the preparation of materials for a training course for management personnel. He remained at that job until August of 1957, and also taught an adult education course at the University College of the University of Chicago. More recently he has been devoting half time to teaching at the College, and half time to an administrative post there, and is working toward his Doctor of Philosophy degree on a phase of constitutional law.

Other activities since the original character hearing in 1951 include a 6-week management study of the Socony Mobil Oil Company, in New York in the summer of 1956, pursuant to a business fellowship from the Foundation for Economic Education; and serving as an election judge at the behest of both of the major political parties, in different elections. In this connection, it may be noted that the critical question of some committee members respecting this activity, when Anastaplo refused to identify his party affiliations on constitutional grounds, prompted him to inquire of the county judge whether he had unwittingly breached any rules by serving the Republican and Democratic parties at different elections, and whether something more than *pro forma* identification with a political party might be necessary to serve as an election judge. He also offered to return any payment received for his services. There was, however, no breach of any rules, nor any repayment of earnings necessary.

In the light of all the foregoing evidence appearing in the current record of over 400 pages, compiled pursuant to a searching examination of applicant by the committee during some six sessions of several hours each and extended from February to May of 1958, it is not clear to me just how the majority of the committee or the *per curiam* opinion could conclude that applicant's refusal to reply to the questions on political affiliations prevented the committee from determining his character and fitness. I find apposite the statement in the minority report of the committee: " * * * On this record, it is pure sophistry to hold that his refusals to answer have prevented our determining his character."

I also fail to perceive the necessity for the delay of an entire year between the conclusion of the hearing and the decision of the committee. Although the majority report denied applicant admission to the bar essentially because they claimed his failure to reply to questions on membership in the Communist Party or other subversive groups prevented inquiry into subjects which bear on the issue of character, it is significant that the majority made favorable findings on all matters designed for inquiry in our rehearing order. They found that applicant's views on the right to revolution were not objectionable; nor was there anything objectionable in his activities since the original petition was denied, or with respect to his present reputation. The report stated;

"Since applicant's original application was denied, he has engaged principally in the academic life as an instructor and research assistant at the University of Chicago. * * * From the character affidavits and reference letters which have been submitted to us, it would appear that the applicant is well regarded by his academic as-

sociates, by professors who have taught him in school and by members of the Bar who know him personally. We have not been supplied with any information by any third party which is derogatory to Anastaplo's character or general reputation. We have received no information from any outside source which would cast any doubt on applicant's loyalty or which would tend to connect him in any manner with any subversive group."

Under these circumstances, I find more cogent the rationale of the minority report that since there were no adverse findings on the questions specified for rehearing, and no derogatory information, applicant should not have been denied admission to the bar. I find entirely reasonable the minority's argument that applicant's refusal to answer certain questions was merely one factor which must be weighed along with the reasons for such refusal, and with other evidence; and that refusal to answer questions on grounds of devotion to constitutional principle does not "reflect adversely on character" and is a strange basis for denying admission to the bar.

With reference to the legal questions, I cannot agree with the statement in the *per curiam* opinion that the relevancy and constitutionality of the political-affiliations questions of bar applicants is no longer debatable. That issue has certainly not been determined in any bar admission case. It was expressly left undetermined in the *Konigsberg* case. In fact the court there recognized, as Anastaplo has consistently argued, that there was authority for regarding such questions as unconstitutional. The court stated at p. 270: "Prior decisions by this Court indicate that his [Konigsberg's] claim that the questions were improper was not frivolous (*West Virginia Board of Education v. Barnette*, 319 U.S. 624, 87 L. ed. 1628), and we find nothing in the record which indicates that his position was not taken in good faith."

The *Barnette* case, cited by the court, contained the following celebrated passage at p. 642: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion, or force citizens to confess by word or action their faith therein." [Ital. supplied.]

While this passage, which has not been overruled, lends support to applicant's position that a Character and Fitness Committee, acting for the State Supreme Court would have no right to insist that an applicant reveal his faith in any political credo, that case itself is not decisive. Nor can I agree with the *per curiam* opinion that the recent *Barenblatt* case (*Barenblatt v. United States*, — U.S. —, 3 L. ed. 2d 1115, 79 S. Ct. 1081 (1959) is determinative of that issue, or is in any way factually analogous.

The *Barenblatt* case involved a contempt proceeding in which the petitioner refused to answer questions of the House Un-American Activities Committee relating to his affiliations with the Communist Party on the ground that they were barred by the first amendment. The majority opinion, to which four justices dissented, first explained that where first amendment rights are asserted to bar governmental interrogation, resolution of the issue always involves a balancing by the courts of the private and public interests at stake in the particular circumstances. After reaffirming the principle of the *Sweezy* case (*Sweezy v. New Hampshire*, 354 U.S. 234, 265, 1 L. ed. 2d 1311), that "the subordinating interest of the State must be compelling," in order to overcome the individual rights, the Supreme Court held that the balance must be struck in favor of the governmental interests, since the pertinency of the questions was not open to doubt, and the government's right of self-preservation justified extending its investigatory power in the domain of communist infiltration in education.

Even the broadest interpretation of the *Barenblatt* case, however, would not sanction the type of inquiry made by the committee herein. The court based its decision, in a great measure, on the fact that the inquiry in that case was identified at the outset as an investigation of Communist infiltration in education, and that the individual examined had just previously been identified as a member of an alleged Communist group, and was being asked about that membership.

Such circumstances are a far cry from the situation in the case at bar. It is one thing to sustain the constitutionality of subversive affiliations questions when they are propounded to one identified as a Communist, and submitted by an Un-American Activities Committee of the United States Congress, charged with discovering communist infiltration. It is quite another thing, however, to sanction such questions when asked of one against whom there is not a scintilla of evidence of subversive affiliations, and when the questions are submitted by a bar admission committee, charged only with ascertaining applicant's moral character, and in no way authorized by statute or rule of court to investigate or reject members of any political persuasion from the profession.

In my judgment, furthermore, the fact that the court in the *Barenblatt* case so closely circumscribed its decision, limiting it to the precise circumstances before it, stressing the pertinency of the questions, and calling attention to cases where the individual interests were held paramount, does not indicate a disposition to sustain the constitutionality of such questions in all types of cases.

However, this issue is not decisive in the *Anastaplo* case. As hereinbefore noted, the fundamental issue is not the constitutionality of the political-affiliations questions,

but rather whether applicant's refusal to answer them could be deemed grounds for denial of admission to the bar for failure to establish good moral character. Therefore, I do not deem it necessary to try to resolve the constitutionality of the questions by analogy to the host of other related cases. (*N. A. A. C. P. v. Alabama*, 357 U.S. 448, 2 L. ed. 2d 1488; *American Communications Ass'n v. Douds*, 339 U.S. 382, 94 L. ed. 925; *Slochower v. Board of Higher Education*, 350 U.S. 551, 100 L. ed. 692; *Kent v. Dulles*, 357 U.S. 116, 2 L. ed. 2d 1204; *Sweezy v. New Hampshire*, 354 U.S. 234, 1 L. ed. 2d 1311.) Even if this court were to conclude that the subversive affiliations questions under the circumstances did not offend the first and fourteenth amendments of the Federal constitution, and that George Anastaplo had no constitutional right to refuse to answer the committee's question, his refusal would constitute merely one item of evidence, and we would still be obliged, under the decisions of the United States Supreme Court, to determine his moral character on the basis of the entire record. *Konigsberg v. State Bar of California*, 353 U.S. 252; *Schwartz v. Board of Bar Examiners*, 353 U.S. 232.

In evaluating that record, furthermore, this court may not draw any unfavorable inferences of character from an applicant's refusal to answer questions based upon a good faith reliance on constitutional principles. *Konigsberg v. State Bar of California*, 353 U.S. 252, 1 L. ed. 2d 810.

Inasmuch as I am firmly convinced that the law set forth by the United States Supreme Court in the *Konigsberg* case is determinative of the issue in the instant case, I am obliged to closely examine that decision and the ineffective ways in which the *per curiam* opinion has endeavored to whittle it away and to avoid it as a precedent.

In the *Konigsberg* case a bar applicant who had been identified as a Communist, and had been highly critical of government policies in his writings, was interrogated about his political affiliations and beliefs by the Bar Admission Committee in order to discover whether he was, or had ever been a member of the Communist Party. As in the instant case, the applicant refused to respond to such questions on the ground that they were an intrusion into areas protected by the Federal constitution. He also objected on the ground that California law did not require him to divulge his political associations or opinions in order to qualify for the bar, and that the questions about these matters were not relevant. The Committee denied his application for admission, essentially on the ground that he failed to demonstrate that he was a person of good moral character. The action of the Committee was affirmed by the State court, but was reversed by the United States Supreme Court.

That decision emphasized (1) that bar admission cannot be denied for failure to establish good moral character, unless it appears from an examination of the entire record that a reasonable man could fairly find that there were doubts about applicant's honesty, fairness and respect for the rights of others, and for the laws of the State and the nation; (2) that much significance should be attached to the affidavits relating to applicant's character, and the absence of derogatory testimony; and (3) that in a bar admission case no unfavorable inferences on moral character may be drawn from refusal to answer questions on constitutional grounds.

The *per curiam* opinion, of course, makes no reference to the court's statement at p. 270 disposing of the precise issue involved herein: "Obviously the State could not

draw unfavorable inferences as to his [applicant's] truthfulness, candor or his moral character in general if his refusal to answer [the political affiliations questions] was based upon a belief that the United States Constitution prohibited the type of inquiries which the Committee was making." Nor does the *per curiam* opinion take cognizance of the decisive statement of the court at p. 273: "Without some authentic reliable evidence of unlawful or immoral actions reflecting adversely upon him, it is difficult to comprehend why the State Bar Committee rejected a man of Konigsberg's background and character as morally unfit to practice law."

What "authentic reliable evidence of unlawful or immoral actions reflecting adversely upon him" did the committee have against George Anastaplo? His refusal to answer questions on grounds that they were improper under the first and fourteenth amendments of the constitution? That conduct, according to the United States Supreme Court, may not be deemed adverse character evidence. The record is absolutely devoid of any conceivable derogatory evidence. If the United States Supreme Court had difficulty comprehending why Konigsberg was rejected even though there was some evidence of prior Communist membership and certain inflammatory writings, it would, *a fortiori*, have greater difficulty understanding why Anastaplo was denied admission to the bar where even the committee chairman admitted that there was no evidence whatever that the applicant was in any way ever connected with the Communist Party or with any subversive group.

The *per curiam* opinion endeavors to avoid the impact of this *Konigsberg* case by suggesting that it was not a final determination, since the cause was remanded to the State Court. This is specious reasoning. Obviously the case had to be remanded to the State court, for it is not

the province of the United States Supreme Court to admit persons to membership to the bar of any State, but rather to determine whether the actions and standards imposed by the State in bar admission cases infringed constitutional rights. This the Supreme Court unequivocally did in the *Konigsberg* case, and any subsequent action by the California court in that case cannot modify, or in any way detract from the principles of law promulgated by the Supreme Court in the decision. Its determination that constitutional rights (the due-process guarantee) are infringed when a State denies an applicant admission to the bar for failure to establish good moral character, merely because he refuses on constitutional grounds to answer political or subversive affiliations questions, is binding upon this court and cannot be construed away.

The *per curiam* opinion further attempts to avoid the *Konigsberg* precedent by construing it holds only that there was inadequate notice to the applicant that refusal to answer would warrant rejection. The opinion then asserts that since such a warning was given in the instant case the *Konigsberg* decision is distinguishable. This attempt at refinement of the decision is contrary to the facts. The applicant in the *Konigsberg* case was given the same notice as Anastaplo was given. He was informed that refusal to answer would have a bearing on the committee's determination, and that some committee members did not agree that he had a constitutional right to refuse to answer (Footnote p. 259.) Similarly, the committee herein warned Anastaplo at p. 37 of the record, that his "refusal to answer may be taken into account by the Committee in determining whether you have established your fitness to become a member of the bar." In neither case was the applicant advised that refusal to answer would *ipso facto*

warrant a denial of admission, irrespective of any and all other evidence. On the contrary, the actions of the committee in the instant case in conducting 5 more lengthy hearings, in encouraging the applicant to submit his writings and any other evidence, and in stating that it was "interested in your reasons for not answering," are inconsistent with any warning that refusal to answer would automatically preclude Anastaplo's admission to the bar.

Moreover, even if such a warning had been given, it would have been, according to the *Konigsberg* case, beyond the power of the committee. The court in that case noted that the committee has no authority or power by statute, decision or rule of court to apply a "brand new exclusionary rule," or a "brand new sanction on analogy to the summary contempt cases," whereby refusal to answer a question would mean rejection. The court stated at p. 260-261: "There is nothing in the California statutes, the California decisions or even in the Rules of the Bar which has been called to our attention, that suggests that failure to answer a Bar Examiner's inquiry is ipso facto a basis for excluding an applicant from the Bar, irrespective of how overwhelming is his showing of good character or loyalty or how flimsy are the suspicions of the Bar Examiners." Nor is there any such authority in Illinois for applying any such "brand new exclusionary rule."

Equally untenable is the attempt to sidestep the *Konigsberg* case by bandying about words and arguing that this court is not drawing unfavorable character inferences from applicant's refusal to answer the political affiliations questions, but that such refusal prevented inquiry into subjects which bear upon his character and resulted in his failure to establish good character. As stated in the

minority report, this reasoning is "pure sophistry." Any realistic appraisal of this record indicates that from the searching examination of applicant, from his letters and writings on the responsibilities of a citizen and lawyer to our government, from the writings of statesmen and scholars whose views he embraced, from the affidavits elicited by the committee, and from the committee's own independent investigation, it should have known well George Anastaplo, his moral character and his views respecting our constitutional government. Moreover, through its power of subpoena, the committee could have supplemented that fund of knowledge if necessary.

Therefore, in my judgment the determinative principles of the *Königsberg* case cannot be avoided by any of the techniques of construction advanced in the *per curiam* opinion. Nor is the law of that case in any way modified or affected by the *Beilan* and *Lerner* cases relied upon by the *per curiam* opinion. (*Beilan v. Board of Education*, 357 U.S. 399, 2 L. ed. 2d 1414; *Lerner v. Casey*, 357 U.S. 468, 2 L. ed. 2d 1423.) These cases both carefully distinguished the *Königsberg* case. They involved public employees who were dismissed under the Pennsylvania School Code and the New York Security Risk Law, respectively, for refusing, on fifth amendment grounds, to answer questions about membership in the Communist Party.

For those cases to be determinative of the Anastaplo case, we must equate "refusal to answer" with failure to establish good moral character. This means that the remainder of the evidence in the record, including all of the other questions and affidavits of good moral character is immaterial. Under this interpretation, the committee should have concluded the hearing after the first unanswered question on religious affiliations at p. 18 of the

record, or shortly thereafter at p. 34, when the first political affiliations questions were unanswered, for nothing said thereafter would have any significance.

How can this interpretation be squared with the committee's statement at p. 37 of the record that it was interested in applicant's reasons for not answering, or with the 6 sessions it held, or with the 400-page record it encouraged? How can such a course be followed in the light of the determinations in the *Konigsberg* case at p. 264 that in bar admission cases moral character must be determined from the entire record, and that refusal to answer on constitutional grounds is an insufficient basis for a finding of failure to establish good moral character.

The construction advanced by the *per curiam* opinion, moreover, would be inconsistent with the purpose and function of a character and fitness committee. That body is not an Un-American Activities Committee charged with investigating Communists, with power to require—indirectly—non-communist oaths on pain of denial of admission to the bar. Nor it is conducting a contempt proceeding with the denial of the right to practice law imposed as punishment for refusal to answer questions which the Committee regards as "proper." It is not inconceivable, furthermore, that refusal to answer might be more indicative of good character in some instances, than answering. We have only to recall the unconstitutional religious interrogation of applicant herein to appreciate that fact.

Furthermore, the *per curiam* opinion has apparently lost sight of the fact that the *Lerner* and *Beilan* cases did not involve bar admissions, but rather the duties of public employees to their employer—a category which has long been given special treatment in the law. (*Garner v. Board of Public Works*, 341 U.S. 716, 95 L. ed. 1317; *Adler v. Board*

of Education, 242 U.S. 485, 96 L. ed. 517.) In fact, the *Lerner* and *Beilan* cases add very little to the law laid down in the *Garner* and *Adler* cases, which were decided long prior to the *Königsberg* case, which did not even refer to those cases or regard them as authoritative in bar admissions interrogations.

In relying upon the *Beilan* and *Lerner* cases the *per curiam* opinion has deliberately overlooked the striking differences in the operative facts of those cases and the case at bar. The *Beilan* and *Lerner* cases involved evidence of "suspect activities," and membership in the Communist Party, all of which is entirely lacking in the instant case. Moreover, refusal to answer the subversive affiliations questions in those cases was predicated upon the privilege against self-incrimination, whereas in the case at bar Anastaplo would refuse to answer even if the replies reflected favorably upon him. In fact, his refusal was not limited to questions about subversive groups, but extended to all political affiliations, including membership in the Republican and Democratic parties.

In my judgment these fundamental differences in the operative facts certainly affect the significance of the refusal to answer, and warrant treating such refusal differently in the *Lerner* and *Beilan* cases than in the case before us.

In reviewing the other authorities cited by the *per curiam* opinion, I note the conspicuous omission of any discussion of the leading bar admission case of *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 1 L. ed. 2d 796. In that case the United States Supreme Court in a unanimous decision held that unless the committee's finding of failure to establish good moral character is substantiated by evidence, a denial of admission to the bar on that ground violates the due-process clauses of the Federal and State constitutions.

The court held that irrespective of whether the practice of law is labelled a "right" or a "privilege" (which the *per curiam* opinion calls it), an applicant cannot be excluded from practice in a manner, or for reasons that contravene the due-process clause of the fourteenth amendment. At p. 239, the court emphasized that any qualifications imposed by the State must have a rational connection with the applicant's fitness or capacity to practice law. Not only must the State avoid arbitrary standards, but even in applying permissible standards, it cannot exclude an applicant when there is no basis for finding that he fails to meet these standards.

After a review of the relevant principles of law in bar admission proceedings, the court found that neither membership in the Communist Party during the years between 1932 and 1940, nor the use of aliases to secure jobs, nor arrests under the particular circumstances constituted adverse evidence of moral character. The court reasoned that even though the nature and purposes of the Communist Party of 1950, as viewed in the *Douds* case (*American Communications Assn, C. I. O. v. Douds*, 339 U.S. 382, 94 L. ed. 2d 925) may warrant classifying it differently from other political parties, that view did not constitute a "substitute for evidence" to show that the petitioner participated in any illegal activity or did anything morally reprehensible as a member of the party.

The court quoted with approval the concept that "Mere unorthodoxy (in the field of political and social ideas) does not as a matter of fair and logical inference negative good moral character." It then stressed the importance of the character affidavits and the absence of derogatory testimony, and concluded that since there was no evidence to justify the bar examiners' finding that petitioner had not shown "good moral character," the action of the

board, refusing to permit petitioner to take the bar examination, deprived him of due process of law.

If actual membership for 7 years in the Communist Party did not *per se* justify a finding of failure to establish good moral character in the opinion of the United States Supreme Court in the *Schwartz* case, then I fail to perceive how mere disagreement over constitutional interpretation can be deemed such morally reprehensible conduct as would support a finding of failure to establish good moral character, as the *per curiam* opinion has affirmed in the instant case.

Before concluding this dissenting opinion, I am constrained to note that it is hardly consistent with judicial objectivity for the *per curiam* opinion to have overlooked every item of positive evidence submitted in support of establishing applicant's good moral character. Guidance on the meaning of the phrase "good moral character" is found in Justice Frankfurter's concurring opinion in the *Schwartz* case where the learned Justice stated: "It is a fair characterization of the lawyer's responsibility in our society that he stand 'as a shield,' to quote Devlin, J., in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility that have, through the centuries, been compendiously described as 'moral character.' "

Anyone reading this record, whether or not he agrees with George Anastaplo's interpretation of his constitutional rights, cannot come away without being impressed by his adherence to truth and what he regards as basic principles of good citizenship. His refusal to answer certain questions is not in fear of the truth, but rather in defense

of what he believes to be the truth—that a citizen, particularly a lawyer, has a duty to defend constitutional principles, “even at the risk of incurring official displeasure.” His restrained and well mannered testimony and conduct at the hearing corroborate fully the glowing evaluations of his character and reputation in the affidavits submitted to the committee.

On the basis of this entire record, it is my opinion that there was substantial evidence of George Anastaplo's good moral character, which was in no way marred by a single item of evidence from which the committee could reasonably conclude that there were doubts about applicant's honesty, fairness and respect for the rights of others or for the laws of the nation. Under these circumstances, the committee's action denying applicant admission to the Illinois bar on the basis of its finding that he failed to establish good moral character, constituted a denial of due process of law under the decisions of the United States Supreme Court, and should properly have been rejected by this court.

SCHAEFER and DAVIS, JJ., also dissenting:

As a result of the exhaustive hearings before the Committee, we now have far more information as to the moral quality, the legal capacity and the political views of this applicant than is ordinarily the case.

The report of the Committee makes it clear that apart from the problems that stem from the applicant's insistence upon what he regards as his constitutional right to refuse to answer questions relating to his political views, there is no basis for denying him admission to the bar. The record suggests nothing derogatory as to his character or his reputation. The affirmative showing of

good character and reputation is entirely convincing. So far as the right of revolution and the use of force to overthrow the government are concerned, the applicant was unable to visualize, in the foreseeable future, any circumstances that might call for its exercise in this country. We agree with the Committee that these views, illustrated as they were by the revolt of Hitler's generals toward the close of World War II and the recent Hungarian revolt, were neither subversive nor foreign to American political philosophy.

But the applicant did refuse to answer questions as to membership in the Communist party or in subversive organizations. Those questions were not predicated upon any information that might have led the Committee to suspect such membership. Despite the fact that the application has been pending for many years, the Committee expressly states that it has "received no information from any outside source which would cast any doubt on applicant's loyalty or which would tend to connect him in any manner with any subversive group."

Our prior decision determined that questions concerning the applicant's membership in the Communist Party or in subversive organizations were relevant, and we must now determine the consequence to be attached to his refusal to answer them. It is possible to say that he has refused to answer relevant questions, that the burden of proof rests on him and that he must therefore be denied admission to the bar.

In our opinion, however, a more penetrating approach to the problem is necessary if we are to discharge our duty with fairness and justice. The applicant has refused to answer these questions because he believes that they violate his rights under the first and fourteenth amendments to the constitution of the United States. He has

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expressly disclaimed any reliance upon the privilege against self-incrimination. His views as to the constitutional propriety of the questions may be right or they may be wrong, but there seems to be no doubt as to their sincerity. Adherence to them has prevented his admission to the bar for many years. We do not see in this record any basis for a finding that the applicant's refusal to answer raises a doubt as to the sincerity with which he takes the oath to support the State and Federal constitutions.

We think that it is unnecessary and inappropriate to decide this matter as though it called for an exercise of the ultimate limits of State power with respect to admission to the legal profession. What is involved is no more than an appraisal of the applicant's moral character and his fitness to practice law. His views upon the right of revolution were fully expounded before the Committee. Those views are incompatible with membership in the Communist Party, or with anything resembling subversion. It is hard to understand the logic of a position that permits the applicant to expound at length upon his views as to the rights of revolution but prevents him from answering questions as to Communist party membership. But we can not say that what seems to us to be a logical inconsistency is a reflection upon his character.

It is true that the work of the Committee has been greatly increased by the applicant's refusal to answer directly. But that refusal appears to have been sincerely based upon constitutional grounds that can not be said to be entirely implausible. To refuse admission, therefore, would amount only to an assertion of power beyond that which is required in order to determine the question before the court.

In our opinion the record sufficiently demonstrates that the applicant possesses the requisite qualifications for admission to the bar.

V.

**LETTER TO PETITIONER FROM THE COMMITTEE
SECRETARY, FEBRUARY 17, 1960.**

Referring to your letter of February 5, 1960,* I have

* This letter is in response to petitioner's letter to the Committee Secretary, February 5, 1960:

No doubt the Committee is aware of the final disposition of my matter by the Illinois Supreme Court. Because of the limited period during which one may appeal, I must now proceed with steps to prepare the case for consideration by the United States Supreme Court.

I should like, nevertheless—especially since I have never regarded my matter simply as a "test case" but primarily as a serious effort to gain admission to the bar—to make every effort to settle this controversy in a manner consistent with the principles and sensibilities of all parties. I wonder, therefore, whether, in the light of the Record and of the various opinions filed by the members of the Supreme Court of this State, the Committee is willing, upon my bringing the standard applicant's questionnaire up-to-date since my last hearing (and assuming there is nothing improper indicated therein respecting my activities since the most recently executed application), to certify me for admission to the bar at this time.

I am sure that, if an understanding should be reached beforehand, the matter could be formally brought before the Committee—for example, by a rehearing, to which an applicant is entitled six months after rejection—so as to return jurisdiction of the matter to the Committee.

The Illinois Court has, by a 4-3 vote, confirmed the power of the Committee to insist on certain questions. But, as I read the three opinions, the Court does not advise the Committee that it must insist on such questions. Thus, my inquiry is, in effect, whether the Committee, having been upheld by its Court in its claim of power, now wishes to exercise that power to the legal limit in this particular situation. I am moved to make this effort partly because three members of the Court have explicitly endorsed, without challenge from their colleagues, my qualifications for the practice of law.

I write as I assume an attorney would on behalf of his client—as an attorney trying to learn whether a long-standing controversy can be settled in such a way as to avoid the unnecessary expense, effort or risk that an appeal might require of all parties. And, to be perfectly frank, I do not look forward, either as attorney or as client, to the many months of litigation that lie ahead, especially if they can be reasonably and honorably avoided by a settlement out of court.

I hope the Committee is able to give my suggestions due consideration.

VI. Constitutional Provisions and Statutes Involved

been instructed by the Committee on Character and Fitness to advise you that the Committee is of the view that there is nothing before it upon which it can act.

In any further proceeding, the Committee will be bound by the action of the Illinois Supreme Court and of the Supreme Court of the United States if that Court takes the case.

VI.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The provisions of the Constitution of the United States involved are as follows:

No State shall . . . pass any Bill of Attainder [or] *ex post facto* Law . . .

Article I, Section 10

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment I

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment XIV

The appropriate parts of the statutes involved are as follows:

Rule 58, Section IX, Rules of Practice and Procedure of the Supreme Court of Illinois; Ill. Rev. Stat. 1951, chap. 110, par. 259.58, IX.

1. At the November term in each year, the Supreme Court shall appoint a Committee on Character and Fitness in each of the Appellate Court Districts of this State, consisting of not less than three members of the bar. . . .
2. Before admission to the bar, each applicant shall be passed upon by the Committee in his district as to his character and moral fitness. He shall furnish the Committee with an affidavit in such form as the Board of Law Examiners shall prescribe concerning his history and environments, together with the affidavits of at least three reputable persons personally acquainted with him residing in the county in which the applicant resides, each testifying that the applicant is known to the affiant to be of good moral character and general fitness to practice law, setting forth in detail the facts upon which such knowledge is based. Each applicant shall appear before the Committee of his district or some member thereof and shall furnish the Committee such evidence of his moral character and good citizenship as in the opinion of the Committee would justify his admission to the bar.
3. If the Committee is of the opinion that the applicant is of approved character and moral fitness, it shall so certify to the Board of Law Examiners and the applicant shall thereafter be entitled to admission to the bar.

III. Rev. Stat. 1951, chap. 13, par. 4.

Every person admitted to practice as an attorney and counsellor at law shall, before his name is entered upon the roll to be kept as hereinafter provided, take and subscribe to an oath, substantially in the following form:

I do solemnly swear (or affirm, as the case may be), that I will support the constitution of the United States and the constitution of the state of Illinois, and that I will faithfully discharge the duties of the office of attorney and counsellor at law to the best of my ability.